Administrative Law & Accountability

Lecture 1

Introduction

This lecture carries the main objectives which are to be discussed in this course; primarily the phenomena of Law, Justice and Constitution will be discussed. Secondly the separation of powers between the three pillars of state, delegated legislations and basic rights of the citizens of Pakistan will also be a part of this course.

Before the philosophical definition of law, lets Identify what is the meaning of term philosophy and definition. Philosophy means the art of reasoning, and definition is a one sentence statement which describes a thing with the help of its properties.

What is 'Law'?
To answer the question, the following definitions are discussed:-

Austinien's definition of law:

John Austin is a renowned **British jurist** of 19th Century. He published extensively on the philosophy of law. He was Professor of Jurisprudence in the **University of London (now University College London)** 1826-33. His book: "**the Province of Jurisprudence Determined was** very popular. He gives the following definition of law:

"Law is the **command** of **the sovereign**"

Command (=Order)
Sovereign (= Ruler)

Thus it may be stated that law is the order of the ruler.

Simple definition of law

"Law is the **right** of one, **obligation** of the other, **maintained** by law **enforcing authority"**

Right (= sheltered and recognized interest)
Obligation (=duty)
Maintained (=managed)
Enforcing authority (= implementing power.)

Thus it may be stated that law is the sheltered and recognized interest of one, duty of the other managed and controlled by law implementing power.

Additional information: 'Kinds of sovereign':

(1) de-jure sovereign (=Constitutional ruler)
(2) de-facto sovereign (=Unconstitutional ruler)
Aristotle defines constitution as, "A constitution denotes not only an arrangement of office, but, a manner of life.

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Aristotle's definition of law:

"Law is the **experience**, developed by **reason** and reason**, tested** by experience".

Experience (=knowledge)
Reason (= rationale)
Tested (=checked)
Thus it may be stated that law is the knowledge, developed by rationale and rationale, checked by knowledge.

Relevant quotation:

Experience is a very hard teacher she gives the test first, the lesson afterwards.

Classical definition of law:

Law is the '**dispassionate reason**' and its **content** is the same as that of morality.

Dispassionate (=unemotional)
Reason (= rationale)
Content (=substance)

Why laws are made?

Laws are made to regulate human actions.

Who makes laws?

Laws are made by super human wisdom. In modern political state they are made by Parliament.

Advantage of law

The supreme advantage of law is peace and harmony. Law governs both the ruler and the ruled.

Concept of supreme law

"Salus est poupli suprema lex" (Latin Maxim)

Salus (= welfare)
est (=is)
Populi (= People)
Suprema (=Supreme)
Lex (=Law)

Thus it means welfare of people is the supreme law.

What is justice?

Justice means every man given his legal right.

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Relevant quote on relationship of law and justice

"Justice is an **ideal** like truth just as a sculptor tries to achieve **beauty** with his **mallet** and **chisel,** so law is the **tool** of a judge in the **pursuit** of justice."

Ideal (=model)

Beauty (=splendor or Prettiness)

Mallet (=hammer)
Chisel (=shape)
Tool (=instrument)
Pursuit (=search)

Thus justice is a model like truth just as a sculptor tries to achieve prettiness with his hammer and a shape so law is the instrument of a judge in the search of justice.

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What are the kinds of justice?

Justice is of following two kinds:

(1) Natural justice
(2) Legal justice

Natural justice deals with the enforcement of rights and punishments of wrongs according to moral standards as appeal to the mind of human being. It stands independent of recognition by state.

Legal justice denotes justice according to what the law declares to be just (=right). Legal justice may be divided in to the following two kinds:

(a) Private justice &
(b) Public justice

Private or personal justice is what the person whose right is violated wants from the counter party. Public or community justice is what a plaintiff demands and receives from the community through court if his counter parties have denied him personal justice. Private Justice is the object for which the public justice exists.

Kinds of public justice:

Following are the two kinds of public justice:

(a) Civil justice
(b) Criminal justice

The two kinds can be well understood by understanding their following points of difference:

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Points of difference between civil justice and criminal justice:

Points of Difference	**Civil Justice**	**Criminal Justice**
Nature of Wrong **Wrong (=**breach of one's legal duty) **Nature** (=character)	Civil justice is **dispensed** for **private wrongs.** **Private wrong** (=breach of right of individual) Dispense (=to give out)	Criminal justice is **dispensed** for **public wrongs.** **Public wrong** (=breach of right of community) Dispense (=to give out)
Purpose	The purpose of civil justice is to **compensate** the aggrieved party. **Compensate** (=reimburse)	The purpose of criminal justice is to **punish** the offenders **Offenders** (=wrong doers) **Punish** (= penalize)
Procedure	For civil justice **civil procedure** is adopted.	For criminal justice **criminal procedure** is adopted.
Nature of Court	Civil justice is administered by **Civil Courts.**	Criminal justice is administered by **Criminal Courts.**
Degree of Harmfulness	Civil wrongs are **relatively less harmful** for the society.	Criminal wrongs are **relatively more harmful** for the society.
Style of Titling	Civil cases are titled as Bashier Hussan versus Nazier Akhtar.	Criminal cases are titled as State versus Bashier Hussain.
Relevant Procedural Code	The relevant procedural Code is 'The Civil Procedure Code, 1908.'	The relevant procedural code is 'The Criminal Procedure Code, 1898.'
Prosecution	In civil justice, government does not prosecute the case.	In criminal justice, government prosecutes the case.
Measuring the liability	In civil cases in determining the liability, the following factors are irrelevant: (1) Motive (2) Intention (3) Magnitude of the offense (4) Character of the offender.	Criminal liability is measured by keeping the following in view: (1) Motive (2) Intention (3) Magnitude of the offense (4) Character of the offender.

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Who makes laws?

Laws are made by super human wisdom. In modern political state they are made by Parliament of a state.

What is Parliament?

The supreme legislative body of a country. The parliament of Pakistan consists of :

National Assembly, Senate and the President.

Supreme advantage of law:

The supreme advantage of law is peace and harmony. Law governs both the ruler and the ruled.

What is justice?

Justice means given every man his legal rights.

It is said that justice is the daughter of law.

What law is considered effective law?

Law that has the following characteristics is known as effective law:

- Issued by the un-commanded commander—the sovereign;
- The commands are backed by threats of sanctions; and
- The sovereign is habitually obeyed.

Some important quotations relating law:

(1) United states is the greatest law making factory the world has ever known.

(2) Laws are imperative in nature.

(3) Law helps the vigilante not the indolent; it means law comes to the assistance of the vigilant, not of sleepy.

(4) Violence is **inimical** to law. **Inimical** (=against)

It means law does not like violence but peace.

(5) People follow truth; truth makes public opinion; public opinion makes law.

Advantages of law

(1) Uniformity and certainty

(2) Equality & impartiality

(3) Protection from errors

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Uniformity and certainty

The first of the advantages is that the law imparts uniformity and certainty to the administration of justice

Uniformity (=evenness; sameness)

Certainty (=sureness)

This advantage enable the people to know what the law is what would be the decision of the court.

Equality and impartiality

The law is made for no particular person or for no individual case and so admits no respect of person which is incompatible with justice. None can escape from the clutches of law.

Protection from errors:

The law serves to protect the administration of justice from the errors of individual judgment. The establishment of the law is the substitution of the opinion and conscience of the society at large for those of the individual to whom judicial functions are entrusted. Aristotle observes: " to seek to be wiser than the laws is the very thing forbidden by good law itself.

Disadvantages of law

The law is without doubt a remedy for greater evils, yet it brings with it the evils of its own". The evils are discussed as under:

Rigidity:

The first disadvantage of law is its rigidity. Because of its rigidity it applies without any allowance for special circumstances and without turning to the right hand or to the left. In other words rigidity is the failure of law to conform itself to the requirements of special circumstances.

Conservatism:

Conservatism is laws failure to conform itself to those changes in circumstances and in men's views of truth and justice. Progressive societies are in advance of law. The existing body of rules may be found in-applicable to such changed circumstances.

Formalism:

Another vice of the law is the formalism. By this is meant the tendency to attribute more importance to technical requirements than to substantive rights and wrongs. In modern time registration and attestation are examples of formalities.

Needless complexities:

The fourth defect of law is undue and needless complexity. The law becomes more and more complex due to the excessive development of legal system and it becomes too difficult to understand the law.

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Terminologies used in asking the questions:

Questions in exam cannot be answered unless the students learn the meanings of the following terminologies:

Briefly (=in a few words)
Distinguish (=make a distinction)
Distinguishing (=unique)
Explain (=give detail)
Meaning (= sense)
In relation to (= with regard to)
Contemporary (= current; existing)
Differentiate (= separate)
Define (= giving description/ detail of a thing by its properties)
Scenario (= situation)
Describe (= express; explain)
Specific (= exact)
Effect of (= result; outcome)
Analyze (=explore; evaluate; examine)
In particular (= specifically)
Likelihood (= possibility)
Potential (= would be)
Perspective (= view; angle)
Stating (= uttering)
Advise (= give an opinion)
Entitled (= allowed)
Scope (= possibility; capacity, range)
Conclusion (= ending)
Contents (= inside; filling)
Context (= back ground; frame work)
Whether (= used to ask question)
Fluorescent (= shining)
Injury (=grievance; wrong)
Count (= calculation)
Assuming (=assume; presumptuous)
Extent (= degree; scope)
Consider (= judge; evaluate)
Advantage (= lead)
Relative (= comparative)
Concept (= idea)
List (= record)
Detail (= specify)
Consequences (= results; outcome)
Terms (= conditions)
Pursuing (= following)
Grounds (= basis; foundation)
With regard (= in relation to)

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Points to ponder:

Ponder (=think over)

In education, nothing works if the students don't.
Donald E. Simanek (1936-) American physicist, educator, humorist.

Poor is the pupil who does not surpass his master.
Leonardo da Vinci (1452–1519) Italian painter, sculptor, architect, musician, scientist, mathematician, engineer, and inventor. Notebooks.

Kinds of Law

(1) Common law
(2) Equity
(3) Statute law
(4) Substantive law
(5) Procedural law
(6) Private law
(7) Public law
(8) Criminal law
(9) Civil law

Common law:

The term 'common law' is derived from the 'French law word' 'common ley' which means 'the body of law derived from judicial decisions, rather than from **statutes** or **constitutions**.

It is said that reason is the life of law and the Common law itself is nothing else but a reason.

Statute (=a law passed by a legislative body)
Constitution (=the fundamental and organic law of a nation or state that establishes the institutions and apparatus of government, defines the scope of governmental sovereign powers, and guarantees individual civil rights and civil liberties.

Black stone says: 'Common law is the **municipal** law of England or the rule of civil conduct prescribed to the **inhabitants** of the kingdom.

Municipal (= civic; community)
Inhabitants (= residents)

About common law it is also said that: 'Common law is the experience expressed in law'.

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Equity:

Equity is not part of the law, but a **moral virtue**, which **qualifies moderates** and **reforms** the rigor, **hardness** and **edge** of the Common law.

Moral (=ethical)
Virtue (=good quality)
Qualify (=succeeds)
Moderate (=modest)
Reform (=restructure)
Hardness (=stiffness)
Edge (=stitching)

Thus it may be stated that Equity is not part of the law, but an ethical good quality, which succeeds, moderates and restructure the rigor, stiffness and stitching of the law.

Equity does not destroy the law nor create it but assist it. Equity is distinguishable from the Common law not because it relates to a different subject matter but merely because it appears at a later stage of legal development.

Underbill says: 'Equity was originally the result of **common sense** against the **pedantry** of law and **trammels** of the feudal system; it became a highly artificial and refined body of legal principles and it is at the present day an amendment and modification of the Common law."

Pedantry (= literalism; lack of imagination)
Trammels (=limits; restrictions)

According to Henry Maine, it is a "fresh body of rules by the side of the original law.

Aristotle says: 'It is equity to **pardon** human failings and to look to the law giver and not to the law; to the spirit and not the letter; to the intention and not to the action; to the whole and not to the part; to the character of the actor in the long run and not in the present moment; to remember good rather than evil, and good that one has received rather than good that one has done; to bear being injured; to wish to settle a matter by words rather than by **deeds**; lastly to prefer **arbitration** to **judgment** for the arbitrator sees what is **equitable**, but the judge only the law and for this an arbitrator was first appointed, in order that the equity might **flourish**'.

Pardon (= forgive)
Deeds (= activities)
Arbitration (= mediation; settlement)
Judgment (= announced decision of court)
Equitable (= consistent with principles of justice and right)

Statute law

A law passed by the parliament of England.

English parliament = House of Commons + House of Lords+ Crown

Parliament of Pakistan= National Assembly + Senate + the President

Substantive law

The part of the law that creates, defines, and regulates the rights, duties and powers of parties.

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Procedural law

The body of rules governing procedures and practices.

Private law

Private law is the body of law dealing with private persons and their property and relationships.

Public law

The body of law dealing with the relations between private individuals and the government, and with the structure and operation of the government itself; **constitutional law**, **criminal law,** and **administrative law** taken together.

Constitutional law (= the body of law deriving from constitution)
Criminal law (= the body of law defining offenses against the community at large)
Administrative law (= the law governing the organization and operation of administrative agencies)

Criminal law

The body of law defining offenses against the community at large, regulating how **suspects** are **investigated**, **charged**, and **tried**, and establishing punishments for **convicted offenders**. In a criminal case the state is the **prosecutor** because it is the community as a whole which suffers as a result of the law being broken. Persons **guilty** of crime may be punished by fines payable to the state, imprisonment, or a community based punishment.

Suspect (= accused)
Investigate (= inspect)
Charged (= to be accused of an offense)
Tried (= to be examined judicially)
Prosecutor (= a legal officer who represents a state in judicial proceedings)

Generally, the Police take the initial decision to prosecute but this is then reviewed by the **Prosecution department**.

In a criminal trial the burden of proof to convict the accused is on the prosecution, which must prove its case beyond **reasonable doubt**.

Reasonable doubt (=the doubt that prevents one from being firmly convinced of a defendant's guilt----- 'beyond a reasonable doubt' is the standard used by a jury to determine whether a criminal defendant is guilty)

Crime: an act that the law makes punishable.

Civil law

Civil law deals with disputes over the rights and obligations of persons dealing with each others. It is a form of private law. In civil proceedings, the case is proved on the **balance of probability**. The claimant must convince the court that it is more probable than not that their assertions are true.

Balance of probabilities (= the greater weight of the evidence, not necessarily established by the greater number of witnesses **testifying** to a **fact** but by evidence that has the most convincing force.
Testify (= to give evidence as a witness)
Fact (= any thing that may be perceived by the five senses)

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Lecture 3

Court System of Pakistan

Court system of Pakistan consists of courts diverse in echelons of legal superiority and jurisdiction. Following are the courts of Pakistan:

- Supreme Court of Pakistan
- Federal Shariat Court of Pakistan
- High Courts of Pakistan (One in each province and in Federal Capital)
- District Courts of Pakistan (One in each District)
- Judicial Magistrate Courts (With power of Section 30 of Cr.PC only in criminal trials)
- Judicial Magistrate Courts (In every town and city)
- Executive Magistrate Courts (Summary trial court)
- Courts of Civil Judge (Judges with power of 1st class and 2nd class cases)

The Supreme Court of Pakistan

The Supreme Court stands at the top of Pakistan's judicial hierarchy, it is the final arbiter of legal and constitutional disputes. It has 17 permanent judges; has a permanent seat in Islamabad. It has its Branch Registries in Lahore, Peshawar, Quetta and Karachi. Besides exercising appellate and constitutional jurisdiction and *suo moto* power, the court has also established itself as a de facto check on military power.

The Federal Shariat Court of Pakistan

It was established by the Presidential Order in 1980 to scrutinize all laws of Pakistan which are repugnant to Islamic injunctions. If a law is found **'repugnant'**, the Court is bound to provide notice **thereof** to the government. The court also exercises **jurisdiction** to examine any decision of any criminal court relating application of Islamic Hudd penalties.

Repugnant (=contrary)

Thereof (= of that)

Jurisdiction (= a court's power to decide a case)

The court consists of 8 Muslim judges including the Chief Justice. The Judges are appointed by the President of Pakistan in consultation with the Judicial Committee consisting the Chief Justice of Pakistan (Federal Shariat Court) and the Chief Justice of Pakistan .

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The Federal Shariat Court, on its own motion or through petition by a citizen or a government, has the power to examine and determine as to whether or not a certain provision of law is repugnant to the injunctions of Islam.

Against the orders or decisions of the Federal Shariat Court, an appeal may be **preferred** to the Shariat Appellate Bench of the Supreme Court.

Preferred (=filed)

The court also exercises rivisional jurisdiction over the criminal courts decided Hudood cases. The decisions of the court are binding on the High Courts and subordinate judiciary.



Lahore High Court

Following are High courts in Pakistan:

- Lahore High Court, Lahore, Punjab
- Sindh High Court, Karachi, Sindh
- Peshawar High Court, Peshawar, Khyber Pakhtunkhwa
- Balochistan High Court, Quetta, Baluchistan
- Islamabad High Court, Islamabad, ICT

The High Courts are the appellate courts for all civil and criminal cases in each respective province. The High Courts' jurisdiction is mentioned in the Constitution of Pakistan, 1973, Article 199.

" Article 199 of the Constitution of Pakistan 1973. Jurisdiction of High Court.

(1) Subject to the Constitution, a High Court may, if it is satisfied that no other adequate remedy is provided by law,-

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(a) on the application of any aggrieved party, make an order-

(i) directing a person performing, within the territorial jurisdiction of the Court, functions in connection with the affairs of the Federation, a Province or a local authority, to refrain from doing anything he is not permitted by law to do, or to do anything he is required by law to do; or

(ii) declaring that any act done or proceeding taken within the territorial jurisdiction of the Court by a person performing functions in connection with the affairs of the Federation, a Province or a local authority has been done or taken without lawful authority and is of no legal effect; or

(b) on the application of any person, make an order-

(i) directing that a person in custody within the territorial jurisdiction of the Court be brought before it so that the Court may satisfy itself that he is not being held in custody without lawful authority or in an unlawful manner; or

(ii) requiring a person within the territorial jurisdiction of the Court holding or purporting to hold a public office to show under what authority of law he claims to hold that office; or

(c) on the application of any aggrieved person, make an order giving such directions to any person or authority, including any Government exercising any power or performing any function in, or in relation to, any territory within the jurisdiction of that Court as may be appropriate for the enforcement of any of the Fundamental Rights conferred by Chapter 1 of Part 11.

(2) Subject to the Constitution, the right to move a High Court for the enforcement of any of the Fundamental Rights conferred by Chapter 1 of Part II shall not be abridged. [179] [(3) An order shall not be made under clause (1) on application made by or in relation to a person who is a member of the Armed Forces of Pakistan, or who is for the time being subject to any law relating to any of those Forces, in respect of his terms and conditions of service, in respect of any matter arising out of his service, or in respect of any action taken in relation to him as a member of the Armed Forces of Pakistan or as a person subject to such law.

(4) Where-

(a) an application is made to a High Court for an order under paragraph (a) or paragraph (c) of clause (1), and

(b) the making of an interim order would have the effect of prejudicing or interfering with the carrying out of a public work or of otherwise being harmful to public interest [181] [or State property] or of impeding the assessment or collection of public revenues, the Court shall not make an interim order unless the prescribed law officer has been given notice of the application and he or any person authorized by him in that behalf has had an opportunity of being heard and the Court, for reasons to be recorded in writing, is satisfied that the interim order- (i) would not have such effect as aforesaid; or (ii) would have the effect of suspending an order or proceeding which on the face of the record is without jurisdiction.

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An interim order made by a High Court on an application made to it to question the validity or legal effect of any order made, proceeding taken or act done by any authority or person, which has been made, taken or done or purports to have been made, taken or done under any law which is specified in Part I of the First Schedule or relates to, or is connected with, State property or assessment or collection of public revenues shall cease to have effect on the expiration of a period of six months following the day on which it is made: Provided that the matter shall be finally decided by the High Court within six months from the date on which the interim order in made.]

[185][(4B) Every case in which, on an application under clause (1), the High Court has made an interim order shall be disposed of by the High Court on merits within six months from the day on which it is made, unless the High Court is prevented from doing so for sufficient cause to be recorded.]

(5) In this Article, unless the context otherwise requires, - "person" includes any body politic or corporate, any authority of or under the control of the Federal Government or of a Provincial Government, and any Court or tribunal, other than the Supreme Court, a High Court or a Court or tribunal established under a law relating to the Armed Forces of Pakistan; and "prescribed law officer" means (a) in relation to an application affecting the Federal Government or an authority of or under the control of the Federal Government, the Attorney-General, and (b) in any other case, the Advocate-General for the Province in which the application is made. ”

District & Sessions Courts

District courts exist in every district of each province, and have civil and criminal jurisdiction. In each District Headquarters, there are numerous Additional District & Session Judges who usually preside the courts. District & Sessions Judge has executive and judicial power all over the district under his jurisdiction. The Sessions court is also a trial court for heinous offences such as Murder, Rape (Zina), Haraba offences (armed robbery where specific amount of gold and cash is involved), and is also appellate court for summary conviction offences and civil suits of lesser value. Each Town and city now has a court of Additional District & Sessions judge, which possess the equal authority over, under its jurisdiction. When hearing criminal cases, it is called the Sessions Court, and when it hears civil cases, the District Court. Executive matters are brought before the relevant District & Sessions Judge.

Civil Judge Cum Judicial Magistrates' Courts

In every town and city, there are numerous Civil and Judicial Magistrates' Courts. A Magistrate with the powers of Section 30 of Criminal Procedure Code has the jurisdiction to hear all criminal matters other than those which carry the death penalty such as attempted murder, dacoity, robbery, extortion, etc., but may only pass a sentence of up to seven years' imprisonment. If the court thinks accused deserves more punishment than seven years in jail, then it has to refer the matter to a higher court, with its recommendations to that effect. Every Magistrate’s Court is allocated a local jurisdiction, usually encompassing one or more Police Stations in the area. Trial of all non-bail-able offences, including police remand notices, accused discharges, arrest and search warrants, and bail applications, are heard and

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decided by Magistrate Courts. Most Judicial Magistrates may hear civil suits as well. If they do so, they are usually called a Civil Judge Cum Judicial Magistrate.

Special Tribunals and Boards

Following are the special tribunals in Pakistan:

- Banking Courts
- Services Tribunals
- Income Tax Tribunals
- Anti Corruption Courts
- Anti Narcotics Courts
- Anti terrorist Courts
- Labor Relations Court
- Board of Revenue.
- Special Magistrate courts
- Consumer Courts - drug courts

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Lecture 4

Sources of Law & Delegated Legislation in Pakistan

The terms: 'sources' and 'law' respectively means 'a point that something comes from' and 'rule'. Thus the phrase: 'sources of law' means point wherefrom rules come from. Legislation & Precedent are two main sources of law; lets discuss them one by one.

Legislation:

The term 'legislation' has its **etymology** in the Latin words: 'Legis' & 'Latum' respectively means 'law' & 'to make'. Thus the term 'legislation' means 'to make law'.

Etymology (=origin)

In Pakistan the legislative sovereignty belongs to Parliament. It means only National Assembly, Senate and the President can pass amend or repeal laws to any extent.

Procedure of legislation in Pakistan

The constitution of Islamic republic of Pakistan provides legislative procedure in part III chapter 2. The Parliament make laws, grants finance to the Government and administers the policies of the ministries. The most important function of the parliament is to make laws for the state. Articles 70-89 of the Islamic republic constitution of Pakistan empowers the parliament to make laws.

Definition of bill

A bill is proposal for new law for amending or repealing an old one.

Kinds of bill

Following are the kinds of bill:

(i) Public bill.
(ii) Private bill.
(iii) Money bill.

(i) Public Bill:

It relates to public at large.

(ii) Private Bill:

It relates to the interest of private individuals.

(iii) Money Bill:

It relates to the finance matters.

Legislative procedure

The legislative procedure in different kinds of bill are different.

I. Legislative procedure for ordinary and non money bill is as under:

(i) Introduction of Bill:

Bill may be introduced in any of the two houses. If a bill is introduced by government minister, it is called government. bill and if otherwise it is termed as private bill.

(ii) First Reading:

In the first reading the causes of presentation are explained by the member who introduce the bill.

(iii) Reference to committee:

Bill is examined in detail in committee stage. The committee hears the evidence of expert and any objection of

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any person interested in such bill.

(iv) Second reading:

Bill is discussed clause by clause and amendments may be made during the second reading.

(v) Third reading:

After second reading, it is read third time and sent to the other house.

In the other House the same procedure is adopted to pass the bill.

(vi) President's assent to bills:

If the bill is passed in the joint sitting, with or without amendment, by the votes majority of the total membership of the house. it shall be presented to the president for assent.

Relevant case law:

P.L.D. 2001. Kar. 415

It was held bill would become law when assented it by the president or the governor as the case may be.

II. Legislative procedure in money bill:

Article 73 of the constitution of Islamic republic of Pakistan states that a money bill shall be originated in the National Assembly and after its being passed by the national assembly, without being transmitted to the senate, be presented to the president who will assent to the bill with in thirty day, otherwise the bill shall be deemed to have been assented to and it shall become law.

(a) Features of money bill:

A bill or amendment shall be deemed to be a money bill. If it contains provisions dealing with all or any the following matters.

(a) The imposition, abolition, remission, alteration of any tax.

(b) The borrowing of money or a giving of any guarantee, by the Federal Govt or of the amendment of the law relating to the finance obligation of the Govt.

(c) The custody of the federal consolidate fund, the payment of moneys into, or the issues of moneys from the fund.

(d) The imposition of charge upon the federal consolidated fund, or the abolition or alteration of any charge.

(e) The receipt of money on account of the public accounts of the federation the custody of issue of such money.

(f) The audit of the accounts of the federal Govt.

(g) and Any matter incidental to any of the matters specified above.

(b) Dispute regarding determination of money bill:

If any question arises whether a bill is a money bill or not, the decision of the speaker of the national assembly shall be final.

6. Discussion in senate on money Bill:

Now by the amendment in the constitution (Legal Frame Work order 2002) a money bill can be discussed in the senate.

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7. Distinction between money bill and ordinary bill:

Points of difference between money bill and ordinary bill are following:

(i) As to Nature:

Money bill relates to finance matters.

Ordinary bill relates to the interest of private or public persons.

(ii) As to origin:

Money bill can be originated only in national assembly.

Ordinary bill can be originated in either house.

(iii) As to transmission:

Money bill is not transmitted to other house.

Ordinary bill is transmitted to other house when passed by one house.

Delegated Legislation in Pakistan

In Pakistan, delegated legislation is legislation that is passed **otherwise** than an Act of Parliament.
An **enabling Act or the parent Act** confers a power to make delegated legislation on a GovernmentMinister or another person or body. Several thousand pieces of delegated legislation are made each year, compared with only a few dozen Acts of Parliament.

Otherwise (= or else)
Enabling Act or parent Act (= a law that creates new powers especially a statute conferring powers on an executive agency to carry out various delegated tasks.)
For example section 506 is one of the sections of the Companies Ordinance 1984 that confers delegated powers on the federal government to make relevant rules.
Delegated legislation can be used for a wide variety of purposes, ranging from **relatively** narrow, technical matters such as fixing the date on which an Act of Parliament will come into force, or setting the level of fees payable for a public service, **e.g**. the issue of a passport, to filling in the detail of how an Act setting out broad principles will be implemented in practice.

Relatively (=comparatively)
e.g. (=example given)

Types of delegated legislation

Delegated legislation may take the following forms:

(1) Orders made by the president on the advice of the Federal Cabinet. The Orders are generally used where it would be **inappropriate** for the order to be made by a Minister, for example where the matter is of **constitutional significance** such as transferring powers and functions from one Minister to another, or bringing into force emergency powers to be exercised by Ministers.
Order (= a command; direction; instruction)
Inappropriate (= wrong)
Constitutional (= relating to constitution)
Significance (= worth; importance; impact)

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Orders are usually made by Ministers. An Order is an exercise of executive powers, for example to create or **dissolve** a public body. Commencement Orders are used to set the date on which an Act, or part of an Act, comes into force.

Dissolve (= break up)

(2) **Regulations** are also usually made by Ministers. Regulations are the **means** by which **substantive** and detailed law is made, for example setting out in detail how an Act is to be implemented. Regulations made under the Income Tax Ordinance 2001 are the means by which the Government most often implements tax rules and regulations within Pakistan.

Regulations (= the act of controlling by rules)

Means (= ways)

Substantive Law (= the pat of the law that creates, defines and regulates the rights duties and powers of parties)

(3) Rules set out **procedures**, for example rules governing court procedures, or the way in which the **Patent Office** deals with applications. Rules may be made by Ministers or, if specified in the parent Act, a senior judge.

Procedure (= measures; dealings)

Patent office (=office that deals with the registration of copy rights; design and model etc.)

(5) Directions are a means by which Ministers give legally binding instructions to a public body about the way it exercises its functions.

(6) Byelaws are laws of limited application, usually restricted to certain places, made by local authorities or certain other bodies (for example, train operating companies or Lahore development authority byelaws of construction) to control the activities of the people in construction.

What are the Advantages and disadvantages of delegated legislation

The use of delegated legislation has a number of advantages.

Firstly, it allows laws to be enacted without using up **scarce** Parliamentary time on **technical** matters, for example the fine detail of a public sector pension scheme or the precise design of traffic signs, **thereby** freeing Parliament to discuss matters of broad principle and **policy**.

Scarce (= limited; insufficient; inadequate)

Technical (= methodological)

Thereby (= thus; in that way)

Policy (= strategy)

Secondly, it allows laws relating to technical matters to be prepared by those with the relevant expert knowledge.

Thirdly, delegated legislation is flexible enough to deal speedily with changing circumstances, for example increasing costs of services, developments in scientific knowledge or minor changes in policy. This also makes it invaluable in emergencies when very swift action is required – delegated legislation made under **emergency** powers can be drafted, **enacted** and brought into force in a matter of hours rather than the days, weeks or months that would be required to pass an Act of Parliament.

Emergency (=crisis situation)

Enacted (=passed by parliament)

Delegated legislation can also be criticized on the grounds that it is subject to less parliamentary **scrutiny** than primary legislation and thereby may potentially be used by the Government in ways which Parliament had not **intended** or appreciated when it **conferred** the power.

Scrutiny (= inspection; examination)

Intended (=purported; aimed)

Conferred (=given; granted; bestowed)

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Another disadvantage is in the **sheer volume** of laws that are passed as delegated legislation. Because of this bulk, there is normally little publicity or knowledge about the changes that are being made. However there are both parliamentary and judicial controls on delegated legislation which are discussed below.

Sheer (=pure; utter)
Volume (= quantity; amount)
Controls over delegated legislation:
There are both parliamentary and judicial controls over delegated legislation. The parliamentary controls, by which delegated legislation made by Statutory Instrument may either need to be approved by a vote of each House of Parliament before it is made, or be subject to a veto by either House within a certain period of time after it is made.

Judicial control is exercised through the means of **judicial review.** Because delegated legislation is made by a person exercising a power conferred by an Act of Parliament for a specified purpose, rather than by Parliament exercising its sovereign law-making powers, it can be struck down by the courts if they conclude that it is **ultra vires** This would be the case if the Government attempts to use delegated legislation for a purpose not **envisioned** by the parent Act, or if the legislation is an **unreasonable** use of the power conferred by the Act, or if pre-conditions imposed by the Act (for example, consultation with certain organizations) have not been satisfied.

Judicial review (= a court's power to review the actions of the other branches of government)
Ultra vires (= beyond the power
Envisioned (= predicted; foresaw)
Unreasonable (= illogical;
irrational)

Precedent

Definition of Precedent:

According to Black's law dictionary, 'precedent is making of law by a court in **recognizing** and **applying** new rules **while administering justice'**.

Recognizing(=identifying)
Applying (=implementing)
While (=at the same time as)
Administering (=dispensing or giving out or managing)
Justice (=fairness or righteousness or evenhandedness)

Thus, it may be said that 'precedent is law making by a court in identifying and implementing new rules while dispensing justice'.

Doctrine of judicial precedent
The rule that precedents not only have **persuasive** authority but also must be followed when similar circumstances arise.
Persuasive (= convincing; influential)

Where precedents are reported?
Precedents are contained in Law Reports.
Law reports (=law news)

What is the Purpose of precedent?

A precedent is a 'considered decision' of a court which provides a rule for the determination of an identical or similar question of law. The only theory on which it is possible for one decision to be an authority for another

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is that the facts are alike, or , if the facts are different, that the principle which governed the first case is applicable to the variant facts.
Considered decision (=well thought-out judgment)

Binding Authority of Judicial Precedent or 'Stare Decisis'**:**

The **binding** authority of the precedent is based on the principle of 'stare decisis' which means 'stand by things decided'. Precedents enjoy **value** in a judicial system, due to the following factors:

Binding (=compulsory or unavoidable)
Value (=worth)

(1)Justice is administered by an establishment of judges.
(2) Judges are **specialists** of law
(3) They **represent** the **collective conscience** of **society**.
(4) A case once decided stands correct **unless reversed** by the higher court.
Specialist (=expert) **Represent**
(=symbol of) **Collective** (=joint
or combined)
Conscience (=sense of right and wrong)
Society (= the general public)
Unless (=if not)
Reversed (=overturned)

(5) A rule formulated through precedent is a model implemented on the **subsequent** cases. It brings fair-mindedness and **impartiality** in judicial decisions.
Subsequent (=following or successive)
Impartiality (=neutrality)

(6) Precedent makes the **interpretation** of question of law **final**.
Interpretation (=understanding or explanation)
Final (=absolute or concluding)

Advantages of case law as a source of law:

The law is decided fairly and predictably, so that business men and individuals can **regulate** their conduct by reference to the law. The risk of mistakes in individual cases is reduced by the use of precedents. Case law can adapt to changing circumstances in society, since it arises directly out of the **actions** of society. Case law, having been developed in practical situations, is suitable for use in other practical situations.

Regulate (=adjust)
Actions (= law suits; cases)

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Kinds of Precedent:

Following are the kinds of precedent:

(1) Declaratory Precedent.
(2) Original precedent.
(3) Authoritative precedent.
(4) Persuasive precedent.

Declaratory precedent:

Declaratory precedent is merely an application of an already existing rule.

Original Precedent:

Original precedent is the kind of precedent that creates and applies a new legal rule.

Authoritative precedent.

Authoritative precedent is an applicable holding of a higher court binding

upon the lower courts.

Persuasive Precedent:

A precedent that is not binding on a court, but that is entitled to respect and careful consideration. For example, if the case was decided in neighboring jurisdiction, the court might evaluate the earlier court's reasoning without being bound to decide the same way.

Precedent of absolute authority:

Precedent of absolute authority are those which are absolutely binding, however, unreasonable it may be. Precedents laid down by superior courts are precedents of absolute authority for the subordinate courts.

Precedent of conditional authority:

A precedent which is binding but not absolutely. Thus a decision of a single bench of the High Court is only a conditional authoritative precedent for a judge of the same of another High Court.

Ratio decidendi'

The **ratio** for decision of a particular case or the principle of law on which the decision of a particular case is based is known as its ratio decidendi.. Salmond defines ratio decidendi as under:

" The concrete decision is binding between the parties to it, but it is the abstract ratio decidendi which alone has the force of law as regards the world at large.

Quotient (= value; measure; appraise)
Concrete (= solid)
Abstract (=conceptual)

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Obiter dicta:

All that is said by the court by the way i.e statements of law which go beyond the requirements of the particular case in hand and lay down a rule which is either irrelevant or unnecessary for the decision of that case are called obiter dicta. To put it in brief, when points not directly connected with a case are discussed in a judgment, these remarks constitute obiter dicta. These, when made by superior courts are however binding on the subordinate courts. For the same court they serve merely as **persuasive precedent**.

Persuasive precedent (=A precedent that is not binding on a court, but that is entitled to respect and careful consideration. For example, if the case was decided in neighboring jurisdiction, the court might evaluate the earlier court's reasoning without being bound to decide the same way.

Law reports?

Law reports mean 'law news paper'. In England there are several major series of law reports bound as annual volumes. In addition case law is also available on electronic data base.
Title of civil case law is reported as: 'Carlill v Carbolic Smoke Ball Co.'; 'Carlill' is Claimant whereas 'Carbolic smoke Ball co'. is defendant.
In appeal, the claimant name remains on the first whether he is appellant or the respondent.
Some cases are cited with reference to subject matter for example Re Barrow Haematite Steel Co (a company case). In shipping cases name of the ship is referred for example ' The Wagon Mound'.
Re (=with regard to)
Some older cases are referred by a 'single name' for example Pinnel's case.

Law Reports:
Best v Samuel Fox & Co. Ltd 1952 2 All ER 394

Best (=Claimant)
Samuel Fox & Co. (defendant)
1952 (=year of report)
2 (=Volume 2)
All (All)
ER (=England Law Reports)

Thus it means the report is published at page 394 of Volume 2 of All England Reports for 1952.

Contents of a law report:

Following are the contents of law reports:
(1) Names of the parties
(2) Court
(3) Name (s) of the Judge (s)
(4) Date of hearing
(5) Law Points
(6) Cases cited
(7) Litigation history
(8) Facts
(9) Counsels names
(10) Verbatim (=word for word) text of the judgment
(11) Court order etc.

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How is precedent disregarded?

A precedent may be disregarded in any one of the following two ways:

(1) It may be **overruled** by a court of superior jurisdiction. In such an **eventuality** the precedent loses all its force with **retrospective** effect so that transactions entered in to before the date of overruling shall be affected as much as the transaction entered in to after that ruling.
Overrule (= over ride; rule against)
Eventuality (= chance)
Retrospective (=effect on matter that have occurred in past)

Circumstances attaching weight to precedents:
The circumstances which tend to increase the authority of a precedent are as follows:
(1) **Unanimity** of the court giving the decision.
(2)**Affirmation** of that decision by other courts, it will gain added authority if it is affirmed by a superior court.
(3)**Eminence** of the judge giving the decision.
(4) Absence of criticism by the profession.
(5) Learned argument, consultation of the judge or other great **deliberations**.
(6) Fact of an Act being passed on the same subject matter without **reversing** the decision.
Unanimity (= unity; union)
Affirmation (= confirmation)
Eminence (= renown; distinction)
Deliberation (= thoughtfulness)
Reverse (= turn around)

Circumstances lessening authority of precedents:

Lessening (=decreasing)

The following factors lessen the authority of precedents:
(1) Lack of unanimity in the judges.
(2) Failure to notice a **contrary** decision.
Contrary (=opposing)
(3) Being misled by **reliance** on a case of no authority.
Reliance (= dependence; trust)
(4) Absence of final judgment.
(5) Decisions based on compromise.
(6) Decision being passed **ex parte.**
Ex parte (= without notice to the other party)
(7) Judgments in the absence of argument at the **Bar** or by the court.
Bar (= an organization of members of the legal profession.)
(8) Decisions given in the **haste.**
Haste (= hurriedness)
(9) Case being badly reported.
(10) Agreement of the judges in the result but not in the **reasoning**.
Reasoning (= analysis; logic; way of thinking)
(11) Decision reached in order to avoid some special hardship.
(12) Decision having been doubted or criticized.
(13) Result being **embarrassing** or unjust.
Embarrassing (=uncomforting; upsetting)

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What thing are examined before applying precedent on a case?

(1) A decision must be based on a **'proposition or question of law**'.

(2) A decision must not be based on **question of fact**.

(3) It must have **ratio decidendi**.

(4) The material facts of the case must match with the material facts of the precedent.

Preposition or question of law: (=Question of law is understood in the following three senses:

First Sense	Second Sense
A question of which answer is already **prescribed** in some rule of law. For example punishment for murdering a human being is prescribed in The Pakistan Penal Code, thus opinion of a judge is **ruled out**. **Prescribed** (=given) Ruled out (=prohibited or excluded)	Second sense appears when the language of statute is **dubbed with uncertainty** and various **interpretations** may be drawn from it; thus interpretation of the language becomes the question of law. **Dubbed with uncertainty** (=clothed in ambiguity) **Interpretations** (=explanations)

Proposition or Question of fact (=

Before dealing with 'question of fact', it is important to first understand the term 'fact'---'fact' includes the following:

(a) anything, state of things or relation of things capable of being perceived by senses; and
(b) any mental condition of which any person is conscious.

Question of fact is understood in the following two senses:

First Sense	Second Sense
Question of fact means a question other than a question of law. The phrase 'other than' refers to the two senses of question of law mentioned above.	Where due to contractual breach a question arises before the court as to what should be granted to the plaintiff either damages or specific performance? The question of fact becomes 'question of judicial discretion' as no rule of law applies and court is at discretion to adopt a stance best suited to the circumstances of the case.

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Difference between legislation and precedent or relative advantage of precedent.

Points of difference	**Legislation**	**Precedent**
Origin	Legislation find its source in the law making will of the state	Precedent is derived from the ratio decidendi.
Meaning	Legislation means enactment of a rule of law intended to apply to cases which have not necessarily yet arisen	A precedent is the making of law by the recognition and application of new rules by the courts themselves in the administration of justice.
Object	The object of statute law is to lay down a certain guide for the future conduct.	The object of judiciary law on the other hand is the decision of a particular case.
Form of expression	Statute law is always expressed in general and abstract terms. It is free from limitations of particular facts.	Judiciary law always suffer from the complexity and limitation of its particular facts and cannot be expressed in general and clear terms.
Rules of interpretation	It is easy to interpret where the language of the statute is clear, it is to be given its ordinary meaning.	The enunciation of a rule of law embodies in judicial decision is not so easy. It is ascertained by a process of induction which is as follows.

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Lecture 5

Interpretation of Statutory Law

Etymology of the Term 'Interpretation':

The **term** 'interpretation' is **derived** from Latin 'Interpres-pretis' which means 'to explain the meaning of words'.

Etymology (=origin) **Derive**
(=originate or grow) **Term**
(=word or expression)

Meaning of the Phrase 'Interpretation of Law':

The terms 'interpretation' and 'law' respectively means 'understanding' and 'rule'. Thus the **phrase** 'interpretation of law' means 'understanding of rule'.

Phrase (=expression)

Meaning of the Term 'Interpretation' According to Black's Law Dictionary Edition 8th:

The **process** of **determining** what something **especially** the law or legal document means.

Process (=method)
Determine (=decide)
Especially (=particularly or mainly)

John Salmond & Concept of 'Interpretation of Law':

According to John Salmond, the phrase 'interpretation of law' means 'the process by which court **seeks** to decide the meanings of law. According to him there are two kinds of interpretation:

(1) Grammatical Interpretation &
(2) Logical Interpretation

Concept (=idea)
Seek (=search for)

(1) Grammatical Interpretation:

The term 'grammatical' refers to the 'rules of language that **govern** the **structure** of a sentence'. In grammatical interpretation of law, language rules are applied to understand the meaning of law.

Grammar (=language rules)
Govern (=manage)
Structure (= arrangement)

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What Factors Affects Grammatical Interpretation of Law:

Affect (=have an effect on)

Following factors affect the process of true grammatical interpretation:

(a)Ambiguous language.

(b) Inconsistency **&**

(c) Incompleteness

Ambiguous Language:

The term 'ambiguous' means 'doubtful' or 'unclear'. Sometimes, a sentence or part of a sentence produces two or more different meanings causing vagueness or elusiveness in understanding the law; under such situation, it is the duty of the court to logically determine the real meaning of the sentence by establishing the more **natural**, **consonant** and **obvious** meaning of the sentence.

Natural (=normal)
Consonant (=suitable)
Obvious (=clear)

Inconsistency in the Construction of Law:

The term 'inconsistency' means 'contradiction' or 'discrepancy'. Where different parts of law are in **contradiction** with one another in such a manner that they **destroy** and **nullify** the **spirit** of law, it becomes the duty of court to logically discover the true intention of the **legislature** and make the parts of law **consistent** with one another.

Construction (=structure)
Contradiction (=disagreement or discrepancy))
Destroy (=pull down)
Nullify (=cancel out)
Spirit (=will or force)
Legislature (=parliament or law making body)
Consistent (=dependable)

Incompleteness of Law:

The term 'incompleteness' means 'lacking some thing' or 'having some flaw'. Sometimes there exists a kind of flaw in the law that whole meaning of law cannot be understood. Under such **circumstance**, the defect is cured by doing logical interpretation.

Circumstance (=condition or fact or situation)

Rules of Grammatical Interpretation:

Following are the rules of grammatical interpretation:

(1) The words are understood according to their **definitions** prescribed in the relevant enactment.

Definition (=description of a thing by its properties)

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(2) If required, legal meanings of the words may be consulted from **authentic** legal dictionaries like Black's Law dictionary, Osborn Law dictionary **etc**.

Authentic (=valid; genuine)
etc. (=and others)

(3) If required, meaning of word may be judged by the company it keeps;

Company (=context)

(4) Words are understood in the sense that they possess **since** the time of enactment of law.

Since (=from the time when)

(5) The rule: ' mentioning of one person is the exclusion of other' is applied in a situation where the **subject matter** of law consists of two subjects and there exists a provision that makes reference to only one of the two subjects; the provision is construed without making the reference to the other subject. For example: where the statute has two subject matters**:** 'building' and 'land'. The enactment contains along with other provisions the law regarding land. Here the provision is **construed** without including the term 'building' even though in normal circumstances the term land includes the term 'building'.

Subject matter (=area under discussion)
Construe (=interpret)

(6) 'Expressum facit cessa re ta citum ' is a rule of interpretation of law which states: 'express words **die down** chance of implied interpretation of law'.

Die down (=close or finish)
Implied (=indirect or oblique)

(8) 'Ejusdem generis' is a Latin rule of interpretation which means 'of the same kind or class'.

The rule states: 'when a general word or phrase **follows** a list of **specifics**, the **general** word or **phrase** will be interpreted to include only items of the same type as those **listed'**.

Example:

In the phrase horses, cattle, sheep, pigs, goats, or any other farm animal, the general language used is 'any other farm animal', **despite** its **seeming breadth**, would **probably** be held to include only four-legged, hoofed mammals typically found on farms, and **thus** would exclude chickens.

Follow (=go after)
Specifics (=data)
General (=common or all purpose)
Phrase (=expression)
Listed (=scheduled or programmed)
Despite (=regardless)
Seeming (=apparent)
Breadth (=size or wideness)
Probably (= almost certainly)
Thus (=therefore)

(2) Logical Interpretation:

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The term 'logical' means 'rational' or 'based on reason'. Where grammatical interpretation is impossible, logical interpretation takes its course and the true intention of the legislature is discovered by referring the surrounding facts. **Professor Allen grey says**, 'logical interpretation calls for the comparison of the statutes with each other and with the whole system of law and with the consideration and circumstances in which the statute was passed.

Rules of Logical Interpretation:

Following are the rules of logical interpretation:

(1) The first rule is named as **'golden rule'**. Where court finds clerical mistake in the statute, to **rectify** the errors it introduces saving clause **therein** for the following purposes:
(a) To effectuate the **intention** of the legislature.
(b) To avoid absurd, unjust or immoral interpretations.
(c) To uphold the principles of law.

Rectify (=correct)
Therein (=in the statute or law)
Intention (=objective; plan)

(2) The second rule is **'mischief rule'**. It states where a **statute** has been clearly **enacted** to **suppress** **mischief** of one **sort**, the interpretation must not be **sought** to suppress mischief of different sort fall outside the **intention** of the legislature.

Statute (=law) **enacted** (=passed) **suppress (= restrain) Mischief (=misbehavior) Sort** (=kind or variety)
Sought (=required or wanted)
Intention (=target)

Relevant Case Law:

In Cokery v Capenter 1950. It was held that a bicycle was a 'carriage' for the purpose of the licensing Act 1872 where a defendant was charged with cycling whilst intoxicated. The purpose of the Act was to prevent people who are in a state of intoxication from operating any form of transport on public roads.

(3) The third rule is termed as 'last **antecedent** rule'. This rules states that relative words or phrases are to be applied to the words or phrases immediately **preceding**, and as not extending to or including other words, phrases or **clauses** more **remote** **unless** such **extension** or **inclusion** is clearly required by the **intent** and meaning of the **context,** or disclosed by an examination of the entire Act.

Antecedent (=forerunner or ancestor)
Preceding (= previous or earlier)
Clause(=part)
Remote (=distant or far off)
Unless (=if not)
Extension (=addition or expansion)
Inclusion (=addition)

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Intent (=aim or purpose)
Context (=surrounding circumstances)

(4) The fourth rule is named as 'four corner rule'. The rule states that intention of the legislature must be **gathered** from the statute as a **whole** and not from the **isolated** part **thereof.**

Gathered (=collected) **Whole**
(=total or entire)
Isolated(=lonely or inaccessible)
Thereof (= related to statute)

Conclusion:

Interpretation of enactments is necessary as they are not flawless.

What are the Presumptions applied in interpretation of

statute? Presumption is a legal inference that something exists

It is understood, **except** the statute contains **express words** to the **contrary**, that the following **presumptions** of statutory interpretation apply:

Except (=with the exception of; excluding)
Express words (=articulated communication)
Contrary (=opposing)
Presumption (=supposition; deductions)

(1) A statute can not be enforced with **retrospective effect**.

Retrospective effect (=extending in scope or effect to matters that have occurred in the past.)

(2) A statute does not **bind** the crown.

Bind (=to impose duty on a person)

(3) A statute cannot impose criminal liability with out proof of **guilty intention**. However certain statutes **rebut** this presumption and impose **strict liability** with out proof of guilty intention. For example strict liability for dangerous driving under the Road Traffic Act.

Guilty intention (=intention for committing crime)
Rebut (=disprove; refute)

Strict liability (= liability that does not depend on actual negligence or intent to harm, but that is based on the breach of an absolute duty to make something safe.

(4) A statute does not have the effect of **repealing** the other statutes.

Repeal (=cancel; annul)

(5) The **scope** of a statute in limited to the territorial boundaries of UK, however, statute involving international contents must be **construed** in **harmony** with the **International law**.

Scope (=range; capacity; scale)
Construe (=interpret)

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Harmony (= agreement; synchronization)
International Law (= the legal system governing the relationship between nations.)

(6) A statute does not intend to deprive a person of his **liberty**, however, if it wants to than clear words must be used to make clear the situation and intention of the legislature. Example of such legislation is legislation for mental health and immigration.

Liberty (=freedom from arbitrary or undue external)

(7) On the plea of **nationalization** if a statute deprives a person from his property, the government is supposed to compensate him.

Nationalization (= to put property of an individual or group of individuals under the control of the government which becomes its owner.

(8) A statute does not **alter** the existing common law.

Alter (=change)

Intrinsic & extrinsic aid in interpretation of statutes

Intrinsic aid:

The word intrinsic means built-in; inherent; basic. Thus the intrinsic aid is a built-in aid within the statute. The intrinsic aid consists of the following:

(1) The title of the Act helps in determining the general objective of the enactment.

(2) The preamble of the Act usually contains information regarding the objective of the enactment.

(3) Interpretation sections of an act are also helpful in interpreting the statutes.

(4) Summary notes given in the margin are also helpful in interpreting the statute.

Extrinsic aid:

The term extrinsic means coming from outside; not built-in. Thus the extrinsic aid is an aid which is not available within the statute. It consist of the following:

(1) Reports of the Law Commission

(2) Reports of the Royal Commissions

(3) Reports of the Law Reform Committee

(4) Hansard; the UK **Journal** of UK Parliamentary debates. This follows a decision of the then House of Lords in Papper v. Hart 1992 where it was decided that it is acceptable to look at the original speech which first introduced a bill to ascertain its meaning, but only if the statute is ambiguous or obscure or its literal meaning would lead to **absurdity.**

Journal (=periodical; magazine)
Absurdity (=illogicality; irrationality; silliness)

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Lecture 6

State's Primary & Secondary Functions

Aristotle's definition of state:

"State is a name of such **organized congregation** of **families** and **villages** which aims to provide **facilities** to **leadfree** and **prosperous** life."

Organized (=well thought out or planned or structured)

Congregation (=assemble or bring together or accumulate)

Family (=family unit or relatives)

Village (=rural community)

Facilities (=services or amenities or conveniences)

Lead (=go ahead or live)

Free (=liberated or enlightened or open)

Prosperous (=flourishing or well-to-do)

Thus, state is a name of such well-thought assembling of family units and rural community which aims to provide services to live enlightened and well-to-do life.

Simple definition of state:

"State is an **association** of human beings **established** for the **attainment** of **certainends** from certain **means**".

Association (=union or alliance or society)

Established (=known or recognized)

Attainment (=achievement)

Certain (=sure or definite)

Ends(=objectives or purposes)

Means (=ways or resources)

Thus, state is an alliance or union of human beings known for the achievement of definite objectives from certain ways or resources.

Definition of state by Salmond:

"A state is a **society** of men **established** for the **maintenance** of **order** and **justice** within a **determinedterritory** by way of **force**"

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Society (=union or civilization or culture)

Established (=recognized)

Maintenance (=protection and continuation)

Order (=command or arrangement)

Justice (=fairness)

Determined (=decided)

Territory (=area)

Force (=power)

Thus, state is a union of men established for the protection and continuation of command and fairness within a determined area by way of power.

Why a state is created?

State is created to satisfy the desire of being **sheltered** and have **harmony**, **order** and **progress** in life.

Sheltered (=protected or cushy or cozy)

Harmony (=agreement or synchronization)

Order (=arrangement or command or control)

Progress (=advancement or growth)

Functions of a state:

Following are the functions of a state:

(1) Primary & (2) Secondary **Primary Functions:**

The primary functions include:

(a) Administration of justice &
(b) War

(a) Administration of justice:

Primary function of a state is 'administration of justice'. The terms 'administration' and 'justice' respectively means 'practical management' and the 'giving every man what he deserves as per law', thus, the phrase 'administration of justice' means practical management by which every man is given what he deserves as per law.

State's administration of justice- 'a substitute for private vengeance':

Administration of justice by state is a **civilized substitute** for **private vengeance.**

Civilized (=sophisticated or educated or cultured)

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Substitute (=alternate)

Private (=personal)

Vengeance (=revenge)

Thus, administration of justice by state is a cultured alternative for personal revenge.

Historical Evolution of 'Administration of justice':

In ancient times, man used to take **revenge** **violently** by self-help or with the help of his associates and relatives. As society grew up, the disputes were styled settling with the help of the person of position, **influence** and social status. Later, the institution of Kingship replaced this method and administered justice through appointed**jurists**. In modern world administration of justice is done by **political state** through Magistrates and judges.

Revenge (=pay back)

Violently (= cruelly)

Influence (=power)

Jurist (=philosopher of law)

Political state (=the political system of a body of people who are politically organized)

Political (=pertaining to politics; of or relating to the conduct of government)

Salmond and 'state's administration of justice':

"Law may be defined as **body** of principles recognized and applied by the state in the administration of justice"

Body (=collection)

Lord Bryce and 'administration of justice':

"There is no **bettertest** for the **excellence** of a government than the **efficiency** of its **judicialsystem**."

Better (=superior)

Test (=examination or inspection)

Excellence (=fineness or brilliance or luminosity)

Efficiency (=good organization or effectiveness)

Judicial (=relating to court)

System (=scheme or arrangement)

Thus, there is no superior test for the fineness of a government than the effectiveness of its judicial system.

Pillars of modern system of administration of justice.

The modern system of administration of justice stands on the following pillars:

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(1)State's Physical force

(2)Organized political society

(3)Maintenance of rights as the object.

(4) Public opinion

In equation form the 'modern system of administration of justice' may be described as under:

Modern system of Administration of Justice = Physical force of the state + politically organized society + Maintenance of rights as the object + public opinion.

Kinds of justice or theories of justice:

Justice is of two kinds:

(3) Natural justice
(4) Legal justice

Natural justice deals enforcement of rights and punishments of wrongs according to moral standards. .

Legal justice denotes justice according to what the law declares to be just (=right). Legal justice may be divided in to the following kinds:

(i)Private justice &

(ii)Public justice

Private or personal justice is demanded by an aggrieved party from the wrong doer. Public or community justice is demanded where private justice is not given to aggrieved party. For public justice, case is filed in court of law. Private Justice is the object of public justice.

Kinds of public justice:

Public justice is of two kinds viz. civil & criminal. Criminal justice is **dispensed** for public wrongs; purpose of criminal justice is to **punish** the offenders. Civil justice is **dispensed** for private wrongs; purpose of civil justice is to **compensate** the aggrieved party

(b) War & state:

It is the duty of a state to protect the citizens from the external **aggression** of other countries. The Israelites are of the view that a King must have the following qualities to rule:

(1) He must have power to **dispense** justice among the citizens of a state.
Dispense (=give out)

(2) He must be **courageous** enough to go out and fight battle for the protection of the citizens.
Courageous (=brave or daring)

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Secondary functions of a state:

Following are the secondary functions:

(1) Dispensation of justice among the citizens through legislation.
(2) Establishing effective system of taxation for the collection of revenue.
(3) Establishing effective transportation system.
(4) Establishing effective Transportation system.
(5) Supply of water for all purposes.
(6) Supply of electricity for all purposes.
(7) Scientific research for the economic development of economy.
(8) Establishing educational institutions.
(9) Establishment and maintenance of hospitals.

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Definition of Constitution & Nature & Scope of Administrative Law

Definition of constitution according to Garner's Black's Law Dictionary Edition 9th:

Constitution is the **fundamental** and **organic** law of a **state** that establishes the **institutions** and **apparatus** of **government**, defines the **scope** of governmental **sovereign power** and **guarantees** individual **civil rights** and **civil liberties**.

Fundamental (= basic; elemental)

Organic (= natural; logically accepted or endorsed)

State (= a politically organized body of people in a defined territory)

Institutions (= established organizations of a public character)

Apparatus (= tools; machinery)

Government (= rule; command; regime)

Scope (= range; extent; capacity)

Sovereign power (= ruling power)

Guarantee (= assurance; promise)

Civil rights (=private rights of citizens)

Civil liberties (= civil freedom from arbitrary and undue government restraints)

Thus constitution is the basic and natural law of a state that establishes the organizations of a public character and machinery of government, defines the range of governmental ruling power and assures individuals civil rights and civil liberties.

Note : That most of the rights guaranteed are criminal procedural rights; in incorporating these rights, Pakistan has like many other countries, followed the American Constitution, the oldest written constitution of the world.

Phenomenal growth of government ruling power, a bye product of government spells on negation of people civil rights and civil liberties, is the logical reason for the existence of Administrative Law .Administrative law maintains just and equitable growth of society and maintains social order and focuses on welfare of mankind by reconciling government administrative power with civil rights and civil liberties.

Without an effective administrative law society would die down due to its administrative atrocities; as a matter of fact Administrative Law is a body of logical limitations and affirmative actionable parameters developed and operational zed by the legislature and the courts to maintain and establish a rule of law society.

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Basic objectives of Administrative Law:

Following are the four basic objectives of Administrative Law to:

(1) to check abuse of power by government (Here abuse means a departure from legal and reasonable use; also termed cruel and abusive treatment; cruelty)

(2) to ensure impartial resolution of disputes by court. (Impartial means without prejudice)

(3) to protect citizens from the unauthorized encroachment on their civil rights and civil liberties.

(4) to make government accountable for their actions.

Note: **a student of Administrative Law is not concerned as to how a minister is appointed but only with as to how he discharges his duties.**

Definition of Administrative Law:

It is impossible to give a precise and exact definition of Administrative law; nevertheless attempts have been made by many learned scholars. Following are some comments and definitions:

Maitland's comments on Administrative law:

In England in 1887-8, he commented: constitutional law deals with structure, administrative law deals with function.

Professor H.W.R Wade statement on Administrative Law:

Administrative Law is the body of general principles which govern the exercise of powers and duties by public authorities.

Definition of Administrative Law by K.C Davis:

Administrative law is the law concerning the powers and procedures of administrative agencies, including especially the law governing judicial review of administrative action.

Definition of Administrative Law by Ivor Jennings:

Administrative law is the law relating to administration. It determines the organization, powers and the duties of the Administrative authorities.

Definition of Administrative Law by Dicey:

Administrative Law relates to that portion of a nation's legal system which determines the legal status and liabilities of all state officials, secondly he defines the rights and liabilities of private individuals in their dealings with public officials; and thirdly specifies the procedure by which those rights and liabilities are enforced.

Note: Administrative law is study of pathology of power in developing society. Accountability of the holders of public power for the ruled is thus the focal point of Administrative Law.

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Definition of Administrative Law by Wade & Philiphs:

Administrative Law is the law relating to the control of Government power.

His definition focuses that powers of the government must be in legal bounds and not at all be abused.

To sum up all the above discussion it may be said that Administrative law is the branch of public law that deals with the organization, powers of administrative agencies and principles by which an official action is reached and reviewed in relation to individual liberty and freedom.

Mechanism by which Administrative agencies are kept under control:

This control mechanism is called review process. Administrative actions may be controlled by the following:

(1) through writs i.e. writ of habeous corpus; writ of mandamus; writ of certiorari; writ of prohibition; writ of quo warranto.

(2) through filing suits in ordinary courts.

(3) by involving higher authorities.

(4) through public opinion and mass media.

(5) consumer protection societies.

(6) through the office of Ombudsman.

(7) right to know , right to reply and discretion to disobey are indirect method of controlling check on mal administration.

Note : Study of Administrative law is not an end itself but a means to an end.

Nature & Scope of Administrative Law:

What is meant by the term nature? Nature is a fundamental quality that distinguishes one thing from the other. What is meant by scope? Scope means range; extent; capacity. The scope of Administrative law includes administrative authorities and the manner they exercise their power and when they abuse their powers, the remedies available to an aggrieved person. Abuse of power by administration is considered evil in a progressive society. Since government functions have been increased manifold and due to delegated legislation administrative agencies make plethora of rules, regulations, bye laws and notifications that substantially affects the rights of citizens. Administrative authorities also exercise judicial powers for adjudication of dispute by establishing number of tribunals. In many statutes provisions have been made taking away jurisdiction of traditional courts and virtually given powers to these tribunal; hence administrative authorities besides exercising wide **discretionary power** have also been exercising **quasi legislative** and **quasi judicial** powers.

Discretionary power (= power to make decision without any one else's advice or consent)

Quasi legislative power (= an administrative official's power of law making)

Quasi judicial power (= an administrative officials power of adjudication)

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Under the preventive detention laws they can detain and put behind the bar citizens and subjects even without regular trial and deprive them their freedom and liberty. **Lord Denning** states: properly exercised the new powers of the executive laid to the welfare state; but abused they lead the **totalitarian state.**

Totalitarian state a government that subordinates the individual to the state and strictly controls all aspects of life by coercive measures (http://www.thefreedictionary.com/totalitarian+state)

Pakistan is a welfare state it has a constitution. It besides maintaining law and order also does number of commercial activities. It runs PIA, Pakistan Railways, Universities and financial institutions etc.

Conclusion

According to Schwartz there is basic inequality between the private party and the government agency and the goal of Administrative Law is to ensure that the individual and the state are on a plane of equality before the bar of justice.

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Lecture 8

Distinction between Administrative Law & Constitutional Law

Points of Difference	Administrative Law	Constitutional Law
As to definition	Administrative Law deals with administration and determines the administrative powers and duties.	Constitutional Law relates with composition and powers of organs of a state and regulates the relation of various state organs to one another and to the private citizen.
As to nature	Administrative Law is flexible.	Whereas constitutional law is rigid.
As to scope	Administrative law deals with details.	Constitutional law deals with fundamentals as it is organic law of a state.
As to sources	Sources of Administrative Law are statutes, statutory instruments, precedents and customs.	Source of constitutional law is constitution.
As to the state of rest and motion	Administrative law describes various organs of the government at motion.	Constitutional law describes various organs of state in the state of rest.
As to supremacy	Administrative law is subsidiary law because it is derived from the constitution.	Constitutional law is the supreme law of the land, has overriding effects.
As to division of power	Subject matter of Administrative Law is executive and executive action.	Constitutional law divides powers between the three organs of a state viz. legislature, executive and judiciary.
As to amendment	Administrative law is easy to amend.	Because of difficult procedure Administrative Law is not easy to amend.
As to right & remedy	Administrative Law provides specific rights for specific person or class of person.	Constitutional law provides fundamental and substantive rights and the remedy is available through court of law.

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Kinds of Administrative Action

What is meant by administrative action?

Administrative action includes the following:

(1) administrative direction

(2) administrative instructions

(3) administrative functions

In other words it may be said that whatever stems from administrative process is known as administrative action.

Kinds of administrative action:

Beyond doubt administrative action is a bye product of government, under administrative law administrative actions are divided in to the following:

(1) quasi legislative action or rule making action

(2) quasi judicial action or decision making action

(3) administrative action

Quasi Legislative Action:

As per constitution of Pakistan it is the duty of legislature to make laws for Pakistan but due to vast area of legislation it is not possible for the federal legislature to provide qualitative and quantitative legislation for all walks of life, therefore delegated legislation gets its course. Whenever an administrative agency under delegated legislation makes rules it is said that it is exercise of a quasi legislative power by the administrative agency.

Quasi judicial action or decision making action.

As per constitution it is said that it is the duty of the traditional courts to dispense justice but the courts cannot do this as they cannot dispense justice in every walk of life hence tribunals are given this task of **dispensation of justice.** Therefore we see that majority of the decisions affecting the citizens are given by administrative agencies.

Dispensation of justice (= bestowing of justice)

In 1932 the Donoughmore Committee on Minister's power critically analyzed the characteristics of "As to What is a True Judicial Decision"; and this regard the committee concluded that the attributes the presence or absence of which will determine a decision as quasi judicial decision or a true judicial decision. The committee prescribed that 'a true judicial decision' presupposes a list between two or more parties and than involve the following four requisites:

(1) presentation of facts.

(2) ascertainment of facts by means of evidence given by the parties.

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(3) ascertainment of question of law on the basis of submission of legal arguments.

(4) a decision which disposes of the whole matter by applying the law to the facts.

The commission prescribed that a quasi judicial decision involves the first two determinants though it may or may not involve the third but never involves the fourth determinant because instead of applying law on the facts, the administrative agencies apply **policy**, expediency or discretion to it, meaning thereby, less of law more of discretion policy is followed

Policy (=strategy)

Administrative action or rule application action

Administrative action is neither legislative nor adjudicatory for example issuing directions to a subordinate officer not having the force of law or making a **reference** to a tribunal for **adjudication** under the law of Industrial Relations or preventive detention, internment, externment and deportation or fact finding action or requisition, acquisition and allotment.

Reference (= the act of sending)

Adjudication (= the act of deciding the dispute judicially)

It is said that administrative action may be statutory having the force of law or not having the statutory force of law. It is observed that majority of administrative action is statutory as statute gives force of law but in some cases it may be non-statutory such as issuing direction to subordinate not having the force of law but its violation may be treated as disciplinary action.

Finality of administrative action

Generally, in order to make an administrative action final, a clause is inserted in a statute by which the action of an administrative authority is made final. Such clause is also named as finality clause, exclusion clause, ouster clause or conclusion clause.

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Lecture 9

Rule of Law

Meaning of Rule of law according to Black's law dictionary edition 9th:

Rule of law means supremacy of law as opposed to **arbitrary** power.

Arbitrary (= illogical; capricious)

Rule of Law & Aristotle:

According to Aristotle rule of law means rule of divine or natural law as opposed to rule of law **promulgated** by human rulers.

Promulgated (=proclaimed or declared)

Rule of law according to Bracton:

In the 13th century he said that the world was governed by law, human or divine and the king was subject to God and to the law because the law makes him king.

It is also said that rule of law means **preclusion** of arbitrary action on the part of rulers.

Preclusion (= avoidance)

Another sense in which 'rule of law' may be used is that all citizens are in parliamentary democracy to obey the law unless changed by due process. The expression all citizen includes common man, administrative agencies and judges etc.

Dicey's three different senses of rule of law:

First sense: that no man is punishable except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land. In this sense rule of law is **contrasted** with the system of government based on wide arbitrary of discretionary power.

Contrast (= dissimilarity)

Second sense: that every man whatever of his rank or condition is subject to the ordinary law of the land and amenable top the jurisdiction of ordinary courts. Equality before law; no man is above the law.

Third sense: the general principles of the British Constitution especially the liberties of the individual such as personal liberty, freedom of speech and public meeting are the result of judicial decisions in particular cases. The constitution is judge made.

Effects of the theories of law:

(1) These theories may influence legislators.

(2) The courts will interpret legislation keeping in view the theories of rule of law. For example courts presume that Parliament does not intend to restrict private rights.

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(3) The rule of law may act as a rule of evidence in order to give rise to presumption that every one is **prima facie** equal before the law.

Prima facie (= apparent from the face)

Dicey's concept of rule of law has had its advantages and disadvantages. Although complete absence of discretionary power or absence of inequality are not possible in this administrative age, yet the concept of rule of law has been used to spell out many **propositions** and **deductions** to restrain an undue increase in administrative powers and to create control over it. The rule of law has given philosophy to **curb** the government's power and to keep it within bounds. It has provided touch stone to judge and test administrative law prevailing in the country at a given time. Traditionally, rule of law denotes absence of arbitrary powers and therefore one can **denounce** increase of arbitrary or discretionary power.

Proposition (=proposal)

Deduction (=inference)

Curb (=control)

Denounce (=condemn)

Advantage of rule of law:

Rule of law substantiates supremacy of courts, hence the courts have power to control administrative action through judicial review. The judicial control of administrative action is the focal point of administrative law. The cardinal principle of administrative law is that the executive must rule under the rule of law and not by its own decree or fiat. Executive is deemed not to have any own inherent power but all its power flow from law. It is a principle that plays vital role in democracies. When it is said that executive should run the affairs of government as per law and if it does not then his action may be brought to judicial review. By all means administrative law promotes rule of law.

Negative side of rule of law

Negative side of rule of law depicts that the traditional courts will control all the administrative action through judicial review. Faith in the courts have stood as hurdle to adopt some other more efficacious methods of controlling administrative actions. The Whyatt Report 1971 suggested that the setting up of an administrative division in the High Court is necessary to control the administrative action. New Zealand, a country with the Common Law system, has established separate administrative division in Supreme court to control the administrative actions. In Australia, the Common Wealth Administrative Committee in its report published in 1971, suggested establishment of an Administrative Tribunal to review administrative decisions involving discretion on merits.

It is aptly clear that mere judicial review cannot provide an effective mechanism to control on the action of administration. Therefore some other control mechanism should be incorporated.

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Lecture 10

Rule of Natural Justice

What is Rule of Natural Justice?

There are following two principles that are known as rule of natural justice:

(1) **Nemo in propria causa index ess debet** (No one should be made a judge in his own cause)
(2) Audi alteram Partem (no one can be condemned unheard)

Rule of Natural Justice is sound product of human civilization.

Rule of Natural Justice is high law of nature.

Rule of Natural Justice is an intelligent common sense of human beings.

In American Jurisprudence it is called "due process of Law

De Smith states "the rule of Natural Justice express the close relationship between Common law and moral principles describing what is right what is wrong."

Megory J. states Natural Justice is simple and elementary, as distinct from justice that is complex sophisticated and technical.

Aim of Natural Justice is to prevent miscarriage of justice.

These two basic principles on which the whole superstructure of judicial control of administration are usually not made part of statutory laws.

In a Case Al Hya Noor-ul-Zaman v. AJ & K Zakat Council (NLR 1987 Civil 341, it was held that the principle of Natural Justice shall be presumed to be incorporated in every statute unless its application is excluded by express words in it.

Natural Justice & Statutory Provisions

Generally no provision is found in any statute for the observance of the principles of Natural Justice by the adjudicatory authorities.

Question: Whether the adjudicating authority is bound to follow the principle of Natural Justice?

The law got well settled after the powerful pronouncement of Byles.J.in Cooper v. Wandsworth Board of Works (1863) 14CB (NS) 180, wherein his Lordship Observed the following:

" A long course of decisions beginning with Dr. Bentley's case and ending with some very recent cases, establish that although there are no positive words in the statute requiring that the party shall be heard , yet the justice of the common law will supply the omission of the legislature.

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De smith also says that where a statute authorizing interference with property or civil rights is silent on the question of notice and hearing, the courts will apply the rule as it is of universal application.

It is against the rule of Natural Justice if the complainant and the judge and the prosecution is one and the same person. PLD 1965 SC 64

Professor H.W.R Wade's view on rule of Natural Justice:

Breach of natural justice will produce void decisions.

Against whom rule of Natural Justice can be enforced

No doubt that principle of natural justice is binding on all courts , judicial bodies and quasi judicial bodies , but the important question is **whether the rule of Natural Justice is applicable on administrative authorities?**

Answer is: where the duty is merely administrative and not judicial or quasi judicial it will be erroneous to say that while issuing administrative order the principle of Natural Justice will apply.

The compulsion of hearing before passing an order implied in the maxim: Audi Alteram Partem applies only to judicial or quasi judicial proceedings.

In Pakistan it is the opinion of the courts that unless the authority concerned is required by the law under which it functions to act judicially there is no room for the application of the rule of Natural Justice. Meaning thereby purpose of the rule of Natural Justice is to prevent miscarriage of justice

Third principle of Natural Justice:

Traditional English Law recognizes following two principles of Natural Justice:

(1) **Nemo in propria causa index ess debet** (No one should be made a judge in his own cause)
(2) **Audi alteram Partem** (no can be condemned unheard)

However due to rapid growth of 'Administrative Law' & 'Constitutional Law' a third principle of Natural Justice has been evolved which is:

(3)Speaking order or reasoned decision

Speaking order means an order speaking for itself. In other words every order must contain reason in its support. According to this principle the party effected must know why and on what grounds the order was passed against him.

As to why reasons for a decisions are required to be disclosed?

There are three reasons:

(1) Aggrieved party has right to appeal to appellate court on the ground that the decision of the authority is based on erroneous reasons.
(2) Obligation to record reason is a deterrent against arbitrary action taken by executive authority invested with judicial power.

Bias or interest:

First requirement of rule of natural justice is that judge must be impartial, neutral and free from bias.

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What is bias?

Bias is an intention to decide for or against one party without proper regard to the true merits of the case.

Kinds of bias

Following are kinds of bias:

(1) Pecuniary bias
(2) Personal bias
(3) Official bias

Pecuniary bias

The least pecuniary interest in the subject matter of litigation disqualifies a person from acting as a judge. Greiffith and Street says that a Pecuniary interest, however slight, will disqualify the judge.

Example of pecuniary bias:

Dr. Bonham a doctor of Cambridge University was fined by the college of Physicians for practicing in the city of London without the license of the college. The statute under which the college acted provided that the fines should go half to the King and half to the college, the claim was disallowed by Coke C.J as the college has pecuniary interest in its own judgment and was a judge in its own cause.

Personal bias:

Personal bias arises due to some relationship between the authority deciding the issue and the party which induces him to do the case in his favor. The Supreme court held in a case that the manger cannot conduct an inquiry against a worker arising from the allegation that he had beaten the manager.

Official bias:

The third kind of bias is official bias. A mere general interest in the general object to pursued will not disqualify a judge from deciding the matter. It is necessary that judge must have direct connection in the litigation.

According to Griffeth and Street: "only rarely this bias will invalidate proceedings. A mere general interest in the general object will not disqualify a judge from deciding the matter.

What are the exceptions to the rule of natural justice?

In the following situations rule of natural justice shall not be applied:

(1) Statutory exclusion
(2) Exclusion in case of emergency
(3) Exclusion in case of confidential inquiries
(4) Exclusion in case of preventive action
(5) Exclusion in case of necessity
(6) Exclusion where no right of any person is infringed.

Conclusion

It may said that it is beyond doubt a humanly principle intended to require law with the flare of fairness and to secure justice and over the year it has grown widely in to a pervasive rule affecting vast area of administrative action.

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Lecture 11

Administrative Adjudication

As per constitution, it is said that it is the duty of the traditional courts to dispense justice but the courts cannot do this as they cannot dispense justice in every walk of life hence tribunals are given this task of dispensation of justice, therefore, we see that majority of the decisions affecting the citizens are given by administrative agencies.

Reasons for the growth of administrative adjudication:

Adjudication on a question of law or question of fact between individuals or between the state and an individual is the core business of traditional courts. But due to increase in the role of modern government executive organ of a state also exercises adjudicating power, therefore, it is a wrong notion that traditional courts have monopolistic adjudicating power in a state.

These days, by the side of traditional courts, there are many administrative bodies that are exercising adjudicating power in a state. Administrative adjudication is now an inevitable part of modern government. The trend is functionally all useful hence being practiced in Britain, USA and in all democratic state including Pakistan.

Modern government has increased their governance role manifold; trying to control labor, taxation, excise, financial, health, corporate and all other like issues. Modern government handling these areas of government comes in to conflict with individuals or corporate entities for example taxation issues and to resolve the issue executive itself gives executive adjudication mechanism to resolve the issue and traditional court are not involved. Thus the circumstances necessitate the growth of administrative adjudication.

Administrative adjudication system is relatively low cost easily accessible mechanism of speedy administrative justice. Another cogent reason for the growth of administrative adjudication is that traditional courts are already stuffed with huge stock of pending cases and adjudication process is already very slow there had the other administrative adjudication matter sent to the system of traditional court adjudication, the traditional court must have been collapsed.

It is indeed the expansion of technical, scientific, economic and other alike growth of civilized society that government's functions have increased manifold, hence without administrative adjudication a state now cannot run its affairs nor do good governance.

Another reason in favor of administrative adjudication is that in traditional courts the ordeal of litigation is very high and in administrative adjudication it is relatively low. Political philosophers also give reason for the growth of the administrative adjudication that some time there arise a situation which is resolved by not applying law but applying consideration of policy. Such questions arise in relation to taxation, labor, excise, foreign exchange, preventive detention etc. as a matter of fact such policies cannot be applied in traditional courts but only under administrative adjudication as administrative tribunals are some what under the influence of government.

Judges of traditional courts don't entertain the idea of policy conflicting with law; they always follow law. Administrative adjudication is also favored on the ground that a judge of a traditional court is a generalist and in modern state due to administrative process expert knowledge is required to handle issue involving special knowledge like taxation accounting etc. hence administrative adjudication is inevitable. An expert is in better position to handle such kind of issues.

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Other reason for the growth of administrative adjudication is that they are less expensive, more expeditious and free from procedural technicalities. Finally it may be said that the administrative adjudicatory bodies have grown not from political philosophy but from practical necessity, therefore to cater the need of civilized modern society where role of government have been increased manifold, role of administrative adjudication is practically beneficial.

Harms of administrative adjudication

Following are the harms or problems of administrative adjudication:

(1) Ordinary citizens are feared that all tribunals dispensing administrative adjudication are anti legal in mind set.
(2) Variety of procedures are adopted by variety of tribunal; there in no uniform procedure adopted in all administrative tribunals. Sometimes procedure is laid in the Act or some time it is left to be determined by administrative agency.
(3) Sometimes administrative agency is given power of civil court to compel attendance and production of documents.
(4) In a cases administrative agency does not follow rule of natural justice which is a wrong deviation from universal principle based or derived from human nature.
(5) In administrative tribunals no uniform system of appeal is applicable. Every tribunal has its own procedure sometime appeal is preferred to higher authority or sometimes appeal is made to traditional High Court.
(6) Not all administrative tribunal publish their decisions therefore they avoid public criticism.
(7) It is a rule of natural justice that in litigation there must be a clear aspect of predictability of judicial decision. Administrative adjudication lacks this predictability.
(8) There is also a glaring factor of anonymity of decision involved in administrative adjudication. No one knows wherefrom the decision will come. Some time it is seen that one fine morning a litigant receives a communication or notice that the President or the Governor is pleased to give this decision.
(9) Under administrative adjudication law of evidence is not strictly applied, usually no statement and cross examination is done on witness.
(10) Under administrative adjudication official bias also works at its peak. It is seen that if there is a case between an individual and administrative agencies, the result is normally seen in favor of the agency.
(11) In administrative adjudication, there always seen political influence on judges of tribunal.

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Lecture 12

Delegated legislation:

Delegated legislation is legislation that is passed **otherwise** than in an Act of Parliament. An **enabling Act** or the **parent Act** confers a power to make delegated legislation on a Government Minister or another person or body. Several thousand pieces of delegated legislation are made each year, compared with only a few dozen Acts of Parliament.

Otherwise (= or else)

Enabling Act or parent Act (= a law that creates new powers especially a statute conferring powers on an executive agency to carry out various delegated tasks.)

Delegated legislation can be used for a wide variety of purposes, ranging from **relatively** narrow, technical matters such as fixing the date on which an Act of Parliament will come into force, or setting the level of fees payable for a public service, **e.g**. the issue of a passport, to filling in the detail of how an Act setting out broad principles will be implemented in practice.

Relatively (=comparatively)

e.g. (=example given)

There is hardly a statute which does not delegate some power of delegated legislation on executive.

Types of delegated legislation

Delegated legislation may take the following forms:

(1) **Orders** in Council are made by the Queen on the advice of the **Privy Council**. Orders in Council are generally used where it would be **inappropriate** for the order to be made by a Minister, for example where the matter is of **constitutional significance** such as transferring powers and functions from one Minister to another, or bringing into force emergency powers to be exercised by Ministers.

Order (= a command; direction; instruction)

Privy Council (=in Britain the principal council of the King composed of the cabinet ministers and other persons chosen by Royal appointment to serve as privy councilors)

Inappropriate (= wrong)

Constitutional (= relating to constitution)

Significance (= worth; importance; impact)

Orders of Council are made by the Lords of the Privy Council in their own right. These most commonly relate to the regulation of professional bodies and the higher education sector, over which the Privy Council exercises a **supervisory** function.

Supervisory (= administratively)

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Orders are usually made by Ministers. An Order is an exercise of executive powers, for example to create or **dissolve** a public body. Commencement Orders are used to set the date on which an Act, or part of an Act, comes into force.

Dissolve (= break up)

(2) **Regulations** are also usually made by Ministers. Regulations are the **means** by which **substantive** and detailed law is made, for example setting out in detail how an Act is to be implemented. Regulations made under the European Communities Act 1972 are the means by which the Government most often implements European law within the United Kingdom.

Regulations (= the act of controlling by rules)

Means (= ways)

Substantive Law (= the pat of the law that creates, defines and regulates the rights duties and powers of parties)

(3) Rules set out **procedures**, for example rules governing court procedures, or the way in which the Patent Office deals with applications. Rules may be made by Ministers or, if specified in the parent Act, a senior judge.

Procedure (= measures; dealings)

Patent office (=office that deals with the registration of copy rights; design and model etc.)

(4) Schemes: for example, **schemes** made by the Charity Commission to amended how a charity is governed.

Scheme (=method; format; idea)

(5) Directions are a means by which Ministers give legally binding instructions to a public body about the way it exercises its functions.

(6) Byelaws are laws of limited application, usually restricted to certain places, made by local authorities or certain other bodies (for example, train operating companies or the National Trust for Places of Historic Interest or Natural Beauty) to control the activities of the people in public spaces, such as in public parks or on board public transport.

Advantages and disadvantages of delegated legislation

The use of delegated legislation has a number of advantages.

Firstly, it allows laws to be enacted without using up **scarce** Parliamentary time on **technical** matters, for example the fine detail of a public sector pension scheme or the precise design of traffic signs, **thereby** freeing Parliament to discuss matters of broad principle and **policy**.

Scarce (= limited; insufficient; inadequate)

Technical (= methodological)

Thereby (= thus; in that way)

Policy (= strategy)

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Secondly, it allows laws relating to technical matters to be prepared by those with the relevant expert knowledge.

Thirdly, delegated legislation is **flexible** enough to deal speedily with changing circumstances, for example increasing costs of services, developments in scientific knowledge or minor changes in policy. This also makes it invaluable in emergencies when very swift action is required – delegated legislation made under **emergency** powers can be drafted, **enacted** and brought into force in a matter of hours rather than the days, weeks or months that would be required to pass an Act of Parliament.

Emergency (=crisis situation)

Enacted (=passed by parliament)

Delegated legislation can also be criticized on the grounds that it is subject to less parliamentary **scrutiny** than primary legislation and thereby may potentially be used by the Government in ways which Parliament had not **intended** or appreciated when it **conferred** the power.

Scrutiny (= inspection; examination)

Intended (=purported; aimed)

Confer (=give; grant; bestow)

Another disadvantage is in the **sheer volume** of laws that are passed as delegated legislation. Because of this bulk, there is normally little publicity or knowledge about the changes that are being made. However there are both parliamentary and judicial controls on delegated legislation which are discussed below.

Sheer (=pure; utter)

Volume (= quantity; amount)

Why delegated legislation is need of a modern state?

The need of delegated legislation is based on the fact that the scope of modern government has been widened extensively. Urgencies, complexities and details of governance are so complicated and manifold that delegated legislation seems pragmatic and practicable. It is said that law making is not a turn key project, ready made in all details and to grasp the dynamics of legislation delegated legislation is the real solution.

Factors responsible for the growth of delegated legislation:

(1) Even if member of Parliament work day and night they cannot meet the legislative need of the society, hence delegated legislation is compulsive necessity of a modern state.
(2) Modern day government goes through perplexed and technical issues; they are close to ground realities which the legislature is not; therefore legislature keeps itself to just policy making and delegate the power of legislation to government or executive.
(3) Parent legislation is not easily amendable whereas delegated legislation is easily amendable or tailor able according to the practical needs of the society.
(4) Delegated legislation is easy source of legislation in crisis situation.

Controls over delegated legislation

There are both parliamentary and judicial controls over delegated legislation. The parliamentary controls, by which delegated legislation made by Statutory Instrument may either need to be approved by a vote of each

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House of Parliament before it is made, or be subject to a veto by either House within a certain period of time after it is made, are described in detail in the article on Statutory Instruments.

Judicial control is exercised through the means of **judicial review**. Because delegated legislation is made by a person exercising a power conferred by an Act of Parliament for a specified purpose, rather than by Parliament exercising its sovereign law-making powers, it can be struck down by the courts if they conclude that it is **ultra vires** This would be the case if the Government attempts to use delegated legislation for a purpose not **envisioned** by the parent Act, or if the legislation is an **unreasonable** use of the power conferred by the Act, or if pre-conditions imposed by the Act (for example, consultation with certain organizations) have not been satisfied.

Judicial review (= a court's power to review the actions of the other branches of government)

Ultra vires (= beyond the power)

Envisioned (= predicted; foresaw)

Unreasonable (= illogical;

irrational)

Note: There is a constitutional convention that the House of Lords does not vote against delegated legislation.

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Lecture 13

Controls & Safeguards as Regard Delegated Legislation

Introduction:

Delegation doctrine: the principle that legislature has ability to transfer its legislative power to another government branch especially the executive branch.

Who is delegate? Delegate is an organ of a state who acts for another organ of a state.

Who is delegator? One who delegates a responsibility to another?

What is delegated legislation? A rule or order, having legal force, usually, issued by an administrative agency or executive organ of a state.

During recent past intolerance existed against "delegated legislation" but now a days in almost all democratic states "delegated legislation" is being used as a practical tool for running the affairs of a modern government.

In all countries of the world delegated legislative powers are delegated by the legislature to the executive; even in England the crusade against delegated legislation has been finished and the political philosophers have accepted it as a practical tool for good governance.

In modern world it has been accepted that legislative power can validly and legitimately be delegated to the executive within permissible limits.

At the same time it is also argued that there is also a clear cut danger that the executive may abuse the delegated legislative powers. Executive may use this power for illegal or unreasonable purposes and may usurp civil rights and civil liberties of individuals. Thus the basic problem with delegated legislation is controlling the delegate i.e. executive in exercising its legislative power.

The Committee on Minister's power states "though the practice of delegated legislation is not bad, risk of abuse are incidental to it and therefore safeguards are required if the country is to continue the advantages of the practice without suffering from its inherent dangers. Thus the question is not whether delegated legislation is desirable or not, but is what controls and safeguards can be introduced so that the power conferred is not misused or misapplied or abused or unreasonably used or illegally used.

It is to be noted that there is no **inherent power** of delegation in the legislature. The constitution simply confers power and impose a duty on the legislature to enact laws. If the legislature chooses to delegate and also chooses to cross the implied limits of the constitution and does not perform essential legislative function by determining legislative policy and delegate wide powers to executive it runs the risk of enabling Act being as ultra vires the constitution.

The committee on Minister's powers rightly observed: "we doubt, however, whether Parliament itself has fully realized how extensive the practice of delegated legislation has become, or the extent to which it has become, or the extent to which it has surrendered its own functions in the process, or how easily the practice might be abused."

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Finding Middle Course between two Conflicting Principles

Where two basic principles are in conflict with each other; there it is said that finding a middle course between the two is the need of the day. The two principles are one permitting wide delegation power for practical reason to executive while no new legislative bodies should be set up by transferring essential legislative functions to administrative authorities.

Controls on Delegated Legislation

Control on delegated legislation is divided in to three categories:

(1) Judicial control
(2) Legislative control
(3) Other control

Judicial control: delegated legislation falls under the purview of judicial review. Every democratic state upholds that courts are competent to decide the question of validity of delegated legislation; in this regard the following two sets are applied:

(i) **Substantive ultra vires**
(ii) **Procedural ultra vires**

Substantive ultra vires:

When a subordinate legislation goes beyond the delegate is authorized to make law, it is known as substantive ultravires. Powers delegated by statute is limited by its terms and subordinate to its objects. The delegate must act in good faith, reasonably, intra vires the powers granted and on relevant consideration of material facts. All the decisions of delegate must be in harmony with constitution and other laws of the land. If they are unlawful or unconstitutional or oppressive or outrageous to an unauthorized end or objective. The court might well say, "Parliament never intended to give authority to make such rules, they are unreasonable and ultra vires.

Grounds of Substantive ultra vires

Delegated legislation may be challenged on the grounds of substantive ultra vires in the following circumstances:

(1) Where parent Act is unconstitutional.
(2) Where delegated legislation is unconstitutional.
(3) Where delegated legislation is inconsistent with the parent Act.
(4) Unreasonableness.
(5) Malafide; bad faith
(6) Exclusion of judicial review.
(7) Retrospective operation.

In a case certain employees were promoted to high post in accordance with the rule, thereafter, a correction slip was added with retrospective effect wiping out not only promotion of the employee but even length of service for about nine years. The rule was held to be **arbitrary** since it was not made to meet **exigencies** of service and there was no real objective or purpose behind it.
Arbitrary (= illogical; capricious; founded on prejudice rather than on reason)
Exigency (= a state of emergency)

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Effect of ultra vires act

An ultra vires action is null & void once the court declares that some administrative act is legally zero.

Procedural ultra vires

When a subordinate legislation does not comply with certain procedural requirement prescribed by the parent or enabling Act it is known as procedural ultra vires.

Where while making bye laws or regulations or rules etc. the enabling act requires the delegate to observe a prescribed procedure such as holding of consultation with particular bodies or publication of draft, rules or bye laws or laying them before the Parliament etc. it is obligatory on the delegate to comply with the procedural requirements and to exercise the power in the manner indicated by the legislature. Failure to comply with the same may invalidate the rule.

Procedural requirement:

There are two basic procedural requirements:

(1) Publication
(2) Consultation

Publication

It is a fundamental principle of law that ignorance of law is no excuse **(ignorantia juris non excusat)** but there is also an equally established principle that the public must have access to the law and they should be give opportunity to know the law.

Domatt's observation on Publication of law:

All laws ought to be known or at least laid open to the knowledge of the world in such a manner that no one may claim that he was ignorant of the law.

Where an Act is made by Parliament, the publication of law is not difficult at all; sufficient publicity during the introduction of a bill. Printing, reference to a select committee of Parliament and the report thereon and mass media coverage suffice the act of publication.

Jain & Jain rightly stated that it is essential that people are not caught on the wrong foot in ignorance of the rules applicable to them in a given situation.

Legislative control on delegated legislation

Where Parliament delegates legislative powers to the executive, it must also see that those powers are properly exercised by the administration.

Jain & Jain rightly stated that it is the function of the legislature to legislate but if it seeks to give this power to the executive in some circumstances, it is not only the right of the legislature but also its duty as a principal to see how its agent (executive) carries out the agency entrusted to it. Since it is the legislature which delegates power to the administration, it is primarily for it to supervise and control the actuarial exercise of their power and ensure against the danger of its objectionable abusive and unwarranted use by the administration.

Thus the underlying object of the parliamentary control is to keep watch over the rule making authorities and also to provide an opportunity to criticize them if there is abuse of power on their part.

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Legislative control can be effectively exercised by:

(1) Laying on the table
(2) Scrutiny committee

Laying on the table: in almost all the common wealth countries, '**the procedure of laying on the table'** of the legislature is followed, it secures two purposes, firstly it informs the legislature as to what rules have been made by the executive authorities in exercise of delegated legislation.

Secondly it provides an opportunity to the legislators to question or challenge the rules already made or proposed to be made.

Scrutiny committees:

Laying on the table has not always been mandatory therefore with a view to strengthen parliamentary control over delegated legislation scrutiny committees are established. The functions of the committee is to scrutinize and report to the respective houses whether the delegated legislation was done as per the law or as per the constitutional parameters.

Conclusion:

Parliamentary control is not effective, wade says" one of the features of the 20th century has been a shift of the constitutional centre of gravity away from Parliament and towards the executive.

Other controls on delegated legislation:

Besides judicial and parliamentary control, there are other controls and safeguards as regard delegated legislation. One prominent other control is to precisely limit the power of the delegate.

The precise limits of a law making power which parliament intends to confer on a Minister should be expressly defined in clear and express language by the statute which confers it; when discretion is conferred, its limits should be defined with equal clearness.

The court should also interpret the law in a way that no blanket powers can be exercised by the executive while making rules, regulation, bye laws etc.

Another control as regard delegated legislation is that only trustworthy authorities e.g., Federal Government, provincial government as these authorities will exercise the power conferred on them in reasonable manner.

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Lecture 14

Separation of Power

Lord Acton's saying on all Power & absolute Power:

Lord Acton says "All power corrupts; absolute power tends to corrupt absolutely.

Distrust in human nature

Lord Acton's saying shows distrust in human nature and that is why political theorists advocates that keeping the power distinct and for not permitting the same authority to exercise two or three powers of the state namely legislature, executive and judiciary.

What is the surest way to avoid abuse of power?

The surest way to avoid abuse of power by the governmental agencies is to divide the political power in the hands of different person so that there is effective check on power by the power.

What is the rationale of doctrine of separation of power?

In USA, the doctrine of separation of power was adopted by the convention of 1787 to **preclude** the exercise of arbitrary power and to save the people from **autocracy**.

Preclude (= exclude; rule out)

Autocracy (= dictatorship; monocracy; despotism)

The doctrine of separation of power was formulated by Montesquieu:

Following Aristotle & John Lock, Montesquieu argued that political liberty is to be found only when there is no abuse of power. But constant experience shows that every man invested with power is liable to abuse it and carry his authority as far as it will go. To prevent this abuse, it is necessary that one person should be a check on another.

When the legislative and executive power is united in the same person there can be no liberty. Again there is no liberty if the judicial power is not separated from the legislature and executive. There would be an end to everything if the same person or body whether of the nobles or of the people were to exercise all the three powers.

What Montesquieu meant by separation of power was that legislature and executive should neither have any control over the acts of eachother nor should they exercise the power of each other. In-fact the doctrine was taken over by the framers of the American constitution and had no relevance to British Constitution. In-fact the doctrine has no place at all in parliamentary democracies except in so far as it has secured the independence of judiciary from the control of executive.

Black stone's concept of political liberty

"In all tyrannical government….the right of making and of enforcing laws is vested in one and the same man, or the same body of men; and wherever these two powers are united together there can be no liberty".

John Lock's view on grasping power to make and execute laws in the hands of same persons

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"It may be too great a temptation to human **frailty**, **apt** to grasp at power, for the same persons who have the power of making laws, to have also in their hands the power to execute them, whereby they may **exempt** themselves from obedience to the laws they make, and suit the law, both in its making and execution, to their own private advantage."

Frailty (= weakness)

Apt (= quick)

Exempt (= not liable; free from)

What Montesquieu meant by separation of power?

That legislature and executive should neither have any control over the acts of each nor should they exercise the powers of each other.

Whether doctrine of separation of power has relevance in parliamentary democracies?

The doctrine of separation of power has relevance in the American constitution but has no relevance in parliamentary democracies like Great Britain and Pakistan except in so far as it secures independence of judiciary from the control of executive.

What is parliamentary form of government?

In parliamentary form of government, Prime Minister is selected on the basis that he is the best qualified to secure a majority in parliament. He retains his position so long as the parliament support is with him. He must be a member of parliament. The same person from part of both the legislature and the executive controls the executive and the legislature because it exercises a decisive vote in regard to passage of legislation.

Doctrine has relevance in Presidential form of government

In America there is presidential form of government. The American constitution applies doctrine of separation of power in true letter and spirit. The federal executive power is vested in President. The federal legislative power is vested in Congress and the federal judicial power is vested in Supreme Court. The president and his cabinet are not member of congress except the vice president who presides over the Senate and they are not responsible to Congress. The President holds office for a fixed term. It is not necessary that the President must be from the party that has majority in Congress. The President and his Cabinet cannot initiate bills however in message to Congress they can recommend legislation.

In USA keeping in view checks and balance relating the three organs, separation of power is by no means complete. The fathers of USA constitution intended that the balance of power should be attained by checks and balances between the three organs of a state. The President may veto measures passed by the Congress through its veto may be overridden by two third votes of both the houses. The President has power to negotiate treaties, but they must be ratified by two third vote of Senate. The Supreme Court held that Congress has no power to veto executive acts of the President. The power of judicial review of legislation was assumed by the Supreme Court and was not expressly conferred although it may perhaps be implied by the constitution. The three branches of government are therefore inter related and they act as a check on each other.

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Whether in Pakistan Constitution 1973, there is separation of power and system of check and balance?

In Pakistan constitution 1973 there is neither separation of power nor system of check and balance. In-fact the constitution hardly provides any balance of power between the three organs of state. The primary function of lower house of Parliament is to choose or remove the head of government.

Doctrine means three things today:

In the present day, the doctrine of separation of power means three different senses:

(1) That the same person should not form part of more than one organ of a state. For example a minister or ministers should not sit in a parliament; they must restrict to executive organ of a state.

(2) That one organ of a state must not interfere with the exercise of functions of the other organs of a state. For example judiciary must be independent of the executive.

(3) That one organ of a state should not exercise the function of another for example ministers should not have legislative power.

Relationship between legislature, executive and judiciary:

Relationship between the three organs of state may be easily understood by going through the comments of Wade & Philiphs; they narrate the relationship by quoting example of taxation in the following words:

"the enactment of a law authorizing a new tax is a legislative function; the provision of machinery assessing and collecting the tax payable by each tax payer is an administrative or executive function; the determination of dispute between the tax payer and the tax collector as to tax due in a particular case is a judicial function, involving the interpretation of law and its application to the facts of the case. So too in the field of criminal law; the creation of new offence is a matter of legislation, the enforcement of law is an executive function and trial of alleged offender is a judicial function.

Legislative authority in Pakistan:

In Pakistan legislative authority is vested in Parliament. A bill when passed by the house in which it is originated, is transmitted to the other House and when passed by the other House is present to the President for assent.

Legislative authority of President:

Under Article 89 of the Constitution of Pakistan 1973, the President of Pakistan has power to promulgate ordinance for a period of four months.

Executive function in Pakistan:

The executive authority means "the whole authority to govern' it is executive responsibility to maintain law and order; to promote social and economic welfare of public. Executive function is done by methods ranging from the formation of international relations to the ordinary service provided by executive. In Pakistan all the acts are performed in the name of President'' he is the titular head of a state; prime minister is the real functional executive head of a state; ministers and the civil servants are bound to follow the instructions of Prime Minister.

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Modern approach on separation of power

Though it was held in a case: State versus Zia-ur-Rehman that there is tracheotomy of power between the executive, the legislature and the judiciary, and one organ or sub organ may nor encroach upon the legitimate field of the other, yet it is not separation of power which operates in a constitution; it is the functional distribution and balancing of power which today is operative and treated by the courts as the touch stone for striking down any governmental action as unconstitutional. Today institutions are separated and not this powers. Further the creation of administrative agencies has overridden the theory of separation of power.

In practice, it is only the functional distribution of powers which is operative and the theory of separation of power does not exist because of the following reasons:

All the constitutions including American constitution give provision for three organs of a state but suggest little as to how and by whom the boundaries among their powers are to be drawn.

The inference drawn from the doctrine of separation of powers in various ways have complicated the delegation of functions by legislative bodies to other agencies. It was considered as an obstacle both to the exercise of rule making powers of bodies other than legislature.

There is wide gulf between the political doctrine of separation of power and its application in practice. The legislature cannot delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of government.

In City of Waukegan Vs. Pollution Control Board 1974, the supreme court held that" it has been generally recognized that separation of power does not forbid every exercise of function by one branch of government which conventionally is exercised by another branch.

In F.T.C. Vs. Ruberoid CO. Jackson J. opined: the administrative bodies have become a fourth branch of the government which has deranged our three branch legal theories"

In Fauji Foundation Vs. Shamimur Rehman PLD. 1983 S.C 457, Muhammad Haleem acting C.J said…….the absence of clear demarcation of judicial power as a constitutional safeguard in the realm of separation of powers and the difficulty of protecting it from encroachment by the legislature of the executive, and the question does not seem to be resolved by the application of separation of power theory. Accordingly, in the case of every enactment it will be an open question as to whether an enactment is an exercise of judicial power by the legislature where separate powers are constitutional zed.

In theory there is still the constitutional zed principle of separation of power, but in practice it has suffered a metamorphism so that it is now infected with imprecision and inconsistencies.

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Lecture 15

Distinction between Administrative Functions

Three organs of state:

There are three basic organs of a state: (1) Legislature) (2) Executive, and (3) Judiciary; these three organs perform three kinds of functions; the ordinary function of legislature is law making or enactment of laws; the executive is to administer the law and the judiciary is to interpret the law and to dispense justice to masses.

Relationship between legislature, executive and judiciary:

Relationship between the three organs of state may be easily understood by going through the comments of Wade & Philiphs; they narrate the relationship by quoting example of taxation in the following words:

"the enactment of a law authorizing a new tax is a legislative function; the provision of machinery assessing and collecting the tax payable by each tax payer is an administrative or executive function; the determination of dispute between the tax payer and the tax collector as to tax due in a particular case is a judicial function, involving the interpretation of law and its application to the facts of the case. So too in the field of criminal law; the creation of new offence is a matter of legislation, the enforcement of law is an executive function and trial of alleged offender is a judicial function.

In a case it was held that it cannot be assumed that the legislative functions are exclusively performed by the legislature, executive function by the executive and judicial function by the judiciary.

In Halsbury's law of England, it is stated that howsoever the term: 'the executive or the administration is employed, there is no implication that the functions of the executive are confined exclusively to those of an executive'. Today the executive performs different functions for example it investigates, prosecutes, prepare and to adopt schemes to issue and cancel licenses, to adjudicate on disputes, and impose fine etc.

Whether the functions performed by the executive are purely administrative, quasi judicial or quasi legislative?

It is very difficult to give precise and clear cut answer to the question.; there is no scientific principle to distinguish these three functions from one another, yet the classification is necessary as many consequences flow from it for example if the executive authority performs quasi judicial functions that it has to follow the principle of natural justice.

Distinction between legislative, Executive and Judicial functions

Willis in his treatise on Constitutional Law states: "Mr. Green has defined the legislative power to create rights, powers, privileges or immunities and their correlatives, as well as status, not dependent upon any previous rights, duties, etc

He defines judicial power as the power to create some right or duties dependent upon previous right or duty that is, apparently the power to create remedial legal capacities and liabilities.

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He defines executive power as power including all governmental power which is not part of the process of legislation or adjudication that is the power which is concerned mostly with the management and execution of public affairs.

Distinction between legislative and judicial function:

In a case Justice Holmes made distinction between the legislative and judicial functions in the following words: **"**a judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied there-after to all or some part of those subject to its power."

According to justice Holmes

A legislative function prescribes future pattern of conduct and creates new rights and liabilities. Whereas a judicial function determines rights and liabilities on the basis of present or past facts

Professor Dickinson says: "what distinguishes legislation from adjudication is that the former affects the rights of individuals in the abstract and must be applied in a further proceeding before the legal position of any particular individual will be definitely touched by it; while adjudication operates concretely upon individuals in their individual capacity.

Distinction between legislative and administrative functions.

To draw distinction between the two Griffith and Street have given two following tests:

(1) As per the institutional test that which the legislature enacts is legislation, but the word 'enacts' includes all kinds of action taken by the parliament and thus, this test is not appropriate.
(2) According to the second test, the extent of applicability of the act should be determined. A power to make rules of general application is a legislative power and the rule is a legislative rule, while a power to give an order in specific cases is an executive power and the order is an executive action

De Smith also says that a legislative act is the creation and promulgation of a general rule of conduct without reference to particular cases, while an administrative act is the application of a general rule to a particular case. But this test is also not complete; the difficulty here is that of distinguishing what is 'general' from what is 'specific 'as the difference is only a matter of degree.

In a case in Union of India versus Cynamide India Ltd., the Supreme Court has observed that " with proliferation of delegated legislation, there is a tendency for the line between legislation and administration to vanish into an illusion.

Legal consequences flow from the distinction:

Desmith states that the following legal consequences flow from the distinction:

(1) If an order is legislative in character, it has to be published ina certain manner, but it is not necessary if it is of an administrative nature.
(2) If an order is legislative in character, the court will not issue a writ of certiorari to quash it, but if an order is an administrative order and the authority was required to act judicially, the court can quash it by issuing a writ of certiorari.
(3) Duty to give reasons applies to administrative orders but not to legislative orders.
(4) Only in most exceptional circumstances can legislative powers be sub-delegated, but administrative powers can be sub-delegated.

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Distinction between quasi judicial function from judicial function.

Judicial function:

According to Committee on "Ministers' power a pure judicial function presupposes an existing dispute between two more parties and it involves four requisites:

(1) The presentation of case by the parties to the dispute.
(2) If the dispute is a question of fact, the ascertainment of fact by means of evidence adduced by the parties to the dispute and often with the assistance of argument by or on behalf of the parties, on evidence.
(3) If the dispute between them is a question of law, the submission of legal argument by the parties; and
(4) A decision which disposes of the whole matter by finding upon the facts in dispute and an application to the law of the land to the facts so found, including where required a ruling upon any disputed question of law.

Thus in a pure judicial function, the four aforesaid requisites must be present, if these requisites are present, the decision is a judicial decision even though it might have been made by any authority other than a court for example by a minister, board, executive authority, administrative tribunal.

What is quasi judicial function: the word quasi means 'not exactly' according to the Committee a quasi judicial function presupposes a dispute between the parties and involves the only following two requisites:

(1) The presentation of case by the parties to the dispute.
(2) If the dispute is a question of fact, the ascertainment of fact by means of evidence adduced by the parties to the dispute and often with the assistance of argument by or on behalf of the parties, on evidence.

It does not involve necessarily the third requisite and never involves requisite number 4.

A quasi judicial function differs from purely judicial function in the following respect:

(i) A quasi judicial authority has some of the trapping of a court but not all of them; nevertheless there is an obligation to act judicially.
(ii) A lis inter partes is an essential characteristics of a judicial function, but this may not be true of a quasi judicial function.
(iii) A court is bound by the rules of evidence and procedure while quasi judicial authority is not.
(iv) A court cannot be a judge in its own cause. While an administrative authority vested with quasi judicial power may be a party to the controversy but can still decide it.

Distinction between Administrative and quasi judicial function

Acts of administrative authority may be purely administrative or may be legislative or judicial. Decisions which are purely administrative stand on a wholly different footing from judicial as well as quasi judicial decisions and they must be distinguished. To make a distinction between administrative and quasi judicial function, understanding of the two expressions: 'Lis' & 'Quasi lis' is necessary: Lis means a piece of litigation; a controversy or dispute. And quasi lis means a piece of litigation which is subject matter of administration. Lis inter partes means a controversy between two parties.

A function can be called quasi judicial as distinguished from pure administrative when there is a lis inter partes and administrative authority is to decide it between the parties and to adjudicate upon the lis. In such situation the authority will be acting as quasi judicial.

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There may be cases in which an administrative authority is to decide a lis not between two parties but between itself and another party. Thus where an authority makes an order granting legal aid, dismissing an employee, refusing to grant, revoking, suspending or cancelling a license, cancelling examination result of a student for using unfair means, rusticating a student etc. such decisions are judicial in nature. In all these cases there are no two parties before the administrative authority and the other party to the dispute, if any, is the authority itself, yet there is a situation resembling a lis in such situations the administrative authority has to decide the case objectively after taking in to account the objections of the party before it and if such authority has exceeded or abused its power, a writ of certiorari can be issued against it.

Examples of Administrative functions:

(i) Order setting up a commission of inquiry
(ii) Order for acquisition of property
(iii) Order of preventive detention
(iv) Order of assessment under the Sales Tax Act
(v) Power to issue license or permit.

Examples of quasi judicial functions:

(1) Dismissal of an employee on the ground of misconduct
(2) Disciplinary proceeding against a student
(3) Confiscation of goods under the Customs law
(4) Forfeiture of pension or gratuity
(5) Determination of citizenship.

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Lecture 16

Public Interest Litigation

Introduction to Public Interest Litigation

There is rapid growth of public interest litigation in Pakistan. The Supreme Court and High Courts have entertained petitions filed not only by the aggrieved but by the persons' **action pro bono publico**. It is said that public interest litigation is a new chapter in our judicial system.

The Ford Foundation USA has set up 'the Council for Public Interest Law' which defined the term: 'Public Interest Law' in the following words:

"Public Interest Law" is the name that has recently been given to efforts to provide legal representation to previously unrepresented groups and interests. Such efforts have been undertaken in the recognition that the ordinary market place for legal services fails to provide such services to significant segment of the population and to significant interest, such groups and interests include the poor environmentalist's consumer's racial and ethnic minorities and others.

In America 'Public Interest Litigation' is the name given to efforts to provide legal representation to groups and interests that have been unrepresented or underrepresented in the legal process.

These include not only the poor but ordinary citizen who, because they cannot afford lawyers to represent them, have lacked access to courts, administrative agencies and other legal forums in which basic policy decisions affecting their interest are made.

In Pakistan 'Public Interest Litigation" is justified on the grounds that our population is poor and illiterate, socially and economically backward. The shortcoming has denied millions of people access to justice.

Black's Law Dictionary defines public interest litigation as a legal action initiated in a Court of Law for the enforcement of public interest or general interest in which the pubic or class of the community have pecuniary interest or some interest by which their legal rights or liabilities are affected. The concept of public interest litigation provides opportunity to all the citizens to have inviolable access to justice for the protection and enforcement of fundamental human rights to life and liberty.

Nature of 'Public Interest Litigation':

Due to great awareness on Public Interest Litigation new perspectives are being opened before lawyers, judges and state agencies. Public interest litigation focuses on social welfare and progression of humanitarianism. For courts it is fascinating exercise to deal with Public Interest Litigation as it is a new Jurisprudence being evolved by the courts.

Public interest litigation is part of the process of participative justice; it is a legal aid movement to bring justice within the reach of the poor masses. Public interest litigation is brought before the courts not for the purpose of enforcing the right of one individual against the other as happen in ordinary case but it is intended to promote and support public interest which demands that violation of constitutional or legal right of large number of people who are ignorant and are socially and economically in poor position should not go unnoticed and unaddressed.

That rule of law does not mean that the protection of law is available only to the fortunate few but also available to poor masses.

Public interest litigation is co-operative effort on the part of petitioner, state and the Court.

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Public interest litigation is an opportunity to government to make available basic human rights to the deprived section of the society; and also to assure them social and economic justice which is the signature tune of our constitution.

The courts do not entertain public interest litigation in a confrontational way rather entertain it to ensure observance of social and economic rescue programme. Courts, on filing of petition for public interest litigation, order for the uplift of the poor masses.

Public interest litigation in different countries of the world

Public Interest Litigation in United States of America:

After the social turmoil of the 1960s, the term: 'Public Interest Law' was widely used; Louis Brandies, later Judge of Supreme Court, started advocacy for the interest of the general public. Brandies in his celebrated speech complained that:"able lawyers have to a large extent allowed themselves to become adjuncts of great corporations and have neglected their obligation to use their powers for the protection of the people. "During 1960s and 1970s, a great number of law school graduates wishing to have an impact on the social issues hotly debated within American society at that time. They started defining themselves as: "Public Interest Lawyers" in order to distinguish themselves from the "Corporate Adjuncts".

Public interest litigation in United Kingdom:

Under the legal system of United Kingdom "Public Interest" is used as a defense against certain lawsuit for instance some libel suits and an exemption from certain laws or regulations for example freedom of information laws. Under Common law system judges can make judgment on the grounds of public policy.

Public interest litigation in China:

In China 'Public Interest Law' is an accepted terminology; china does not follow Common Law system in which lawyers are expected to play a key role in " making law, however a small but reasonably effective community of lawyers has gained acceptance of public interest litigation as a legitimate means of resolving social issues and contributing to a harmonious society.

Chinese reformers believe that one avenue for speeding the development of public interest law is implementing an associational standing rule by which organizations can instigate lawsuits to protect the interests of its members.

Public interest litigation in Pakistan:

Public interest Litigation, in simple words, means, litigation filed in a court of law, for the protection of "Public Interest". The concept of Public Interest Litigation is not defined in any statute or in any Act.

It has been interpreted by judges to consider the intent of public at large. Although, the main focus of such litigation is only "Public Interest" there are various areas where a Public Interest Litigation can be filed. e.g.,

- Violation of basic human rights of the poor or the vulnerable groups;
- Content or conduct of government policy;
- Compel public authorities to perform a public duty; and
- Violation of basic fundamental rights.

Public Interest Litigation is a desirable and indeed selfless and noble undertaking. It helps deliver civic justice through speedy, adequate and effective redress upon violation of constitutionally guaranteed rights. Public

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Interest Litigation is meant to protect the rights of public as it brings questions of public importance before a court of law which otherwise may not have been the case and the abuse underlying public interest litigation might have remained unaddressed.

Notwithstanding the need and urgency to take up issue of public interest through exercise of judicial activism, the notion of public interest litigation should be encouraged and promoted in respect of legal rights; because it is not always possible for vulnerable individuals to litigate to protect their or public rights.

It is an established fact that Public Interest Litigation strengthens the rule of law, furthers the cause of justice, helps in securing civil liberties and accelerates the pace of realization of the constitutional objectives. In Pakistan, the phenomenon of Public Interest Litigation is gaining currency as is evident by a number of important cases where Supreme Court of Pakistan has delivered important verdicts by taking suo moto actions. Nonetheless, in exercising jurisdiction, the court must be careful to remain within the allotted sphere and should not interject into the domain of executive or legislation.

http://ljcp.gov.pk/njc/public_interest_litigation.htm

Locus Standi & Public Interest Litigation.

The traditional rule as regard Locus Standi is that the judicial redress is available only to a person suffered a wrong or a legal injury; in other words to have 'locus standi', to file a petition, the petitioner must be an 'aggrieved person', if he has a genuine grievance.

Now the doctrine of locus standi has been evolved by having regard to the peculiar socio-economic condition prevailing in the country. When there is considerable poverty, illiteracy and ignorance obstructing and impeding accessibility and impeding accessibility to the judicial process. It would result in closing the doors justice to the poor and deprived section of the community if the traditional rule of standing evolved by Anglo Saxon Jurisprudence that only a person wronged can sue for judicial redress were to be blindly adhered to and followed, and it is therefore, necessary to evolve a new strategy by relaxing this traditional rule of standing in order that justice may become easily available to the lowly and lost.

In a leading public interest litigation case titled Muhammad Bin Ismail v. Tan Sri Hajji Othman Satt, (1982-2 MLJ133) Justice Wan Yahya (Malaysia) laid the dictum as under: "If they (public authorities) transgress any law or constitutional directive, then any public-spirited citizen, even if he has no greater interest than a person having regard for the due observation of the Law, may move the courts and the courts may grant him the appropriate legal remedy in its discretion".

Pitfalls in public interest litigation:

With the cogent justification for public interest litigation, there are some grave pitfall and shortcomings also which the court must take in to consideration the following:

(1) The court must observe that the petitioner is a bona fide person or group of persons; and they are not doing public interest litigation for their personal gain or benefit.

The court should not allow its process to be abused by politicians and others to delay lawful administrative action to gain political advantages or objectives.

It is also necessary for the court to bear in mind that there is a vital distinction between locus standi and justifiability and it is not every default on the part of state or a public authority that is justifiable.

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The court must observe that while dealing with public interest litigation that it does not overstep the limits of its judicial function and trespass in to areas which are reserved to the executive and the legislature by the constitution.

There may be cases where public interest litigation may affect the rights of persons not before the court, and therefore in giving the relief court must take in to account its impacts on those interests.

The court can treat a letter as a writ petition and take action upon it, but it is not every letter which may be treated as writ petition by the court, it is only where a letter is addressed by an aggrieved person or by a public spirited individual

Danger in public interest litigation is inherent where a mere letter is entertained by a court as a petition from a person whose antecedents and status are unknown or so uncertain that no sense of responsibility can be attributed to the communication.

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Lecture 17

Introduction to Constitution

What is constitution?

"Constitution is the Supreme law of the land, the fundamental law, from which all public authorities derive their powers, all laws their validity and all subjects, their rights."

Definition of Constitution by Bolingbroke:

By Constitution, we mean…..that assemblage of laws, institutions and customs, derived from certain fixed principles of reason….. that compose the general system, according to which the community has agreed to be governed.

Kinds of constitution:

The word: 'Constitution' has two meanings viz. narrower meaning, in concrete sense and (ii) wider meaning in the **abstract** sense. Narrower meaning is given to a written constitution and the wider meaning covers an unwritten constitution.

Abstract (= conceptual)

Narrower meaning:

By a narrower sense constitution means a document having a special **legal sanctity** which sets out the frame work and the principal function of the organs of government of a state and declare the principles governing the operation of those organs.

Legal sanctity (= legal force)

It, is therefore, in accordance with the constitutional law that all private rights have to be determined and all public authorities administered. And if there be a conflict between the Constitution and a sub-constitutional law or the ordinary law, the latter must yield to the former, which must govern the decision in a particular case.

Similarly the administrative acts may be declared without lawful authority and of no legal effect if they conflict with the constitution and the fundamental rights guaranteed by the constitution.

In Pakistan Supreme Court has been established and empowered with judicial review of administrative and legislative acts.

Wider meaning.

The unwritten constitutions of the United Kingdom, New Zealand and Israeel are not covered by the narrower definition because they cannot be derived from a single document.

Why written constitutions are enacted?

Demand for written constitution was raised as an after math of American and French Revolutions; the main stress was that the written constitution must be identified with a single document.

The objective of the written constitution was to meet the following two objectives:

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(1) The **entrenchment** of the principles of constitutionalism and limited government with the object of controlling the three organs of the state.
Entrenchment (=firmly established)

(2) The guaranteeing of basic human rights to the citizens.

Tom Pain describes object of the constitution as under:

'A constitution is a thing **antecedent** to a government and a government is only the creature of a constitution…… a constitution is not the act of a government but of a people constituting a government; and government without a constitution , is a power without a right.

Antecedent (= precursor; forerunner)

Legal consequences of the unwritten constitution:

In Pakistan, as per the spirit of the constitution, there has been introduced federal form of government whereby executive and legislative fields are divided in to Federal and Provincial categories; and the constitutional limits bind both the Federal and the Provincial organs of government.

By virtue of a written constitution, certain rights of citizens described as basic or fundamental rights are placed beyond the reach of the three organs of state.

The fundamental rights may be entrenched by the device of requiring a special legislative procedure if they are to be amended, or even by rendering them unalterable, as in the Federal Republic of Germany.

Many written constitutions seek to avoid concentration of power in the hands of any one organ of a state by adopting the principle of separation of powers, vesting legislative power exclusively in the legislature, executive power in the executive and judicial power in the courts. The unwritten constitution cannot secure these objectives.

For the establishment of Federal system written constitution is necessary. The function of protecting the rights of individuals and minorities against legislative infringement cannot be accomplished in an extremely flexible unwritten constitution.

A flexible constitution is the one under which every law of every description can legally be changed with the same ease and in the same manner by one and the same body. A rigid constitution is the one under which certain laws generally known as constitutional or fundamental law generally known as constitutional laws cannot be changed in the same manner as ordinary law.

Under Pakistan Constitution (Article 239, a bill to amend the constitution may originate in either house and when passed by the votes of not less than two third of the total membership of the house, is transmitted to the other house where it is passed with or without amendment by the same majority.

Where the constitution is written, it is easy to distinguish the constitutional law of a state from the rest of the legal system; but where the constitution is unwritten there is no scientific distinction between that and the rest of the law.

The constitutional law deals with the distribution and exercise of the functions of the government and the relations of the government authorities to each other and to the individual citizen.

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The scope of Constitutional law in Pakistan can only be determined with reference to the Objective Resolution of 1949. The Objective Resolution appeared as a preamble in all constitutions of Pakistan, namely the 1956 Constitution, the 1962 Constitution, the Interim Constitution of 1972 and the present Constitution of 1973.

The preambles of these four constitutions are in fact verbatim et literatim reproduction of the Objective Resolution with minor alteration in phraseology.

The objective resolution has three distinct components. The first is the structural feature which says that the sovereignty of Almighty Allah descending on the people of Pakistan constituting the State of Pakistan is to be exercised through their chosen representatives and the individuals, the authorities, the institutions and the courts do not figure in this structure.

The second is its **qualitative** feature according to which the sovereignty delegated by the Almighty to the chosen representative is further delegated by them to the individuals, the institutions, the authorities, the courts and other instrumentalities of the State.

Qualitative (= good)

The third is its **normative** feature according to which, the norms, the goals and ideals of the state have to be spelt out with particularly for their achievement in the constitution.

Normative (= describing or setting standards)

Subjects of the Constitution of Pakistan 1973

The Constitution of Pakistan, 1973 reflects the commands intended by the Objective Resolution. The Constitution recounts to the following topics:

(1) The Fundamental Rights, the violation of which is redress able by the High Courts under Article 199 and by the Supreme Court under Article 184 (3)

The limitations on Fundamental Rights.

The Principles of Policy for the general guidance of the Legislature. These principles are not **cognizable** by any court of law.

Cognizable (= capable of being judicially tried)

The method of election of the President, the terms and conditions of his office and his **impeachment** and above all his, executive, legislative and other powers, functions, duties and prerogatives and similar matter relating to Governors of the provinces.

Impeachment (=the act of calling an official to remove him from the office)

The constitution of both the Houses of the Parliament, their relations with each other, the qualifications for membership and the privileges of the members etc.

The authority, powers and general working of the Federal Government, the Prime Minster, his Cabinet and the status of Ministers etc.

And the similar matters relating to the provincial government.

The position of the Civil Servants, Armed Forces, the general system of the Courts, their judicial power and jurisdiction, the tenure and immunities of judges.

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The mode of amendment of the Constitution.

Note:

Under unwritten constitutions, it is difficult to make a distinction between Constitutional law and Administrative law.

In continental countries, a distinction is commonly drawn between the two. The subject matter of Administrative law is public administration. Administrative law determines the organization, powers and duties of administrative agencies. An important aspect of administrative law is the control exercised by courts or tribunal over those powers, especially in relation to rights of the citizens.These tribunals or administrative courts may be established in respect of:

(i) Matters relating to the terms and conditions of persons who are or have been in the service of Pakistan. Including disciplinary matters.

(ii) Matters relating to claims arising from tortuous acts of government, or any person in the service of Pakistan, or of any local or other authority empowered by law.

(iii) Matters relating to the acquisition, administration and disposal of any property which is deemed to be enemy property under any law.

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Lecture 18

Fundamental Right: Right to Life & Liberty

What is fundamental right?

A right derived from Constitutional law is known as fundamental right.

What is nationality or citizenship?

According to Black's Law dictionary edition 8th, It is the relationship between a citizen of a nation and the nation itself, customarily involving allegiance by the citizen and protection by the state; membership in a state.

Nationality is important as it relates with **diplomatic** protection abroad, immigration, **deportation** and the negotiation of treaties.

Diplomatic (=ambassadorial)

Deportation (= banishment)

Nationality law is based on the **doctrine of allegiance**,

Doctrine of allegiance (= Blackstone defines allegiance as: " the tie, or ligament which binds the subject to a state, in return for that protection which the state affords to the subject.

Under the Pakistan Citizenship Act 1951, there are following ten kinds of Pakistan citizenship:

(1) By birth in Pakistan before 14 August 1947.
(2) By birth in India having domicile in Pakistan
(3) By naturalization as British subject in Pakistan.
(4) By migration to Pakistan from India before 13 April 1951 to be proved by means of a certificate issued under the Rules.
(5) By birth in Pakistan after 13 April 1951.
(6) By descent if born after 13 April 1951 if father was a citizen of Pakistan at the time of his birth.
(7) By migration from India between 13th April 1951 and 1st January1952 acquired by registration granted by Federal Government.
(8) By migration to India from Pakistan after 1st March 1947 and returning to Pakistan under a permit for resettlement.
(9) By registration of a person whose father or father's father was born in India and was resident outside Pakistan before 13 April 1951 and have obtained a certificate of domicile.
(10) By naturalization under the Naturalization Act, 1926 and registration as a citizen of Pakistan.

Human Rights in International Law:

Human rights were introduced by the United States Declaration of Independence, 1776 and the Declaration of the Rights of Man and Citizen 1789 of the French Revolution.

The United Nations lists 19 major conventions of Human Rights and over 20 Declarations. Others have been adopted by the United Nation specialized agencies.

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The most important of all is, of course, the Universal Declaration of Human Rights adopted by the General Assembly in 1948.

Dignity of man is inviolable:

According to Sharia, it is the state's duty to enhance human dignity and alleviate conditions. Article 14 of the Constitution of Pakistan 1973 lays down that' the dignity of man is "**inviolable".**

Inviolable (=sacred)

Article 3 lays down: "the State shall ensure the **elimination** of all forms of **exploitation** and the gradual fulfillment of fundamental principle, from each according to his ability and to each according to his work."

Elimination (=purging; abolition)

Exploitation (=abuse; misuse)

Article 39 sets down that the state shall-

(a) secure the well being of the people, irrespective of sex, **caste**, **creed** or race, by raising their standard of living by preventing the **concentration** of wealth and means of production and distribution in the hands of a few to the **detriment** of general interest and by ensuring **equitable** adjustment of rights between employers and employee, and landlords and tenants.
Caste (=class) **Creed** (=faith)
Concentration (=focus)
Detriment (=damage; injury)
Equitable (=even handed)

Thus the state shall secure the well being of the people, irrespective of sex, class, faith or race, by raising their standard of living by preventing the focus of wealth and means of production and distribution in the hands of a few to the damage of general interest and by ensuring even handed adjustment of rights between employers and employee, and landlords and tenants.

Right to Life & Liberty:

Lord Atkin said that "right to life and liberty" is "one of the pillars of liberty".

Article 9 of the Constitution of Pakistan 1973 provides that "No person shall be deprived of life or liberty **save** in accordance with law".

Save (=except)

This is the first Fundamental right which finds its place in Chapter 1 of Part II of the Constitution in which 20 fundamental rights are enumerated.

The provisions of Article 9 of the Pakistan Constitution is a declaration that no person is to take life or liberty of another person except under a law authorizing him to do so.

The persons whose life and liberty is threatened is therefore entitled to require the person seeking to deprive him of the right to live or move freely to show the legal authority under which he is purporting to act.

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The Lahore High Court, in Sakhi Daler Khan vs. Superintendent, set the petitioner at liberty as the respondent was arrested and detained in **flagrant violation** of the law.

Flagrant (=blatant)

Violation (= breach; contravention)

The High Court held that no authority can deprive a person whether citizen or not, of his liberty in violation of law, and the deprivation of liberty of the petitioner had to be declared without lawful authority and of no legal effect because it was not in accordance with the law.

Scope of right to life:

Right to life does not mean "restricted to mere vegetative life or animal existence". It means something more than just physical survival. The right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter and other facilities necessary for life.

Right to life includes right to live with human dignity and all that goes along with it, namely, the facilities for reading, writing and expressing in diverse forms, freely moving about and mingling and comingling with fellow human beings".

It was held in a case that right to life includes access to road in hilly areas.

Relevant Case Law:

The Supreme Court of Pakistan in Shela Zia vs. Wapda P.L.D. 1994 S.C. 693 held that environmental pollution caused by electromagnetic radiation of high voltage transmission lines of electricity posed a serious health hazard to the quality of life and was therefore violative of the right to life guaranteed by Article 9 of the Constitution of Pakistan 1973.

The right to life includes right to rehabilitation of bonded laborers who had been earlier released in pursuance of an order of the concerned court.

In Article 9 of the Pakistan Constitution , deprivation of liberty means deprivation of the right to eat and sleep when one lies or to work or not work as and when pleases etc. and includes any assault on the body of a person for example, whipping, torture, blind folding, fettering, house arrest, solitary confinement, preventing a person from reading a book, religious or non religious, is an invasion of liberty, and in the absence of law or rule having the force of law authorizing it, such act of invasion would be violative of Article 9.

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Lecture 19

Fundamental Right: Safeguards as to Arrest & Detention

Definition of arrest:

"Arrest is the restraint of a man's person or liberty, obliging him to be obedient to law".

Explanation:

Arrest involves physical **seizure** of liberty of a person by using force. Normally Police or FIA has powers to arrest a person on account of some criminal offence done by a person.

Seizure (=capture)

The provisions of Magna Carta 1215 and Petition of Rights 1627 provide that no man may be arrested or imprisoned except under due process of law.

What is Magna Carta 1215?

'Magna Carta' (Latin) means 'great Charter'. The English Charter that King John Granted to the Barons in 1215 and that Henry III and Edward I later confirmed. It is generally regarded as one of the great Common Law document and as the foundation of constitutional liberties.

What is Petition of Rights 1627?

One of the great charters of English Liberty establishing that no man be compelled to make any gift, loan, benevolence, tax, or such like charge, without common consent by act of Parliament.

What is due process of law?

The conduct of legal proceedings according to established rules and principles for the protection and enforcement of private rights.

Usual course for the Police making arrest:

Usually before making arrest Police formally applies to a concerned Magistrate for issuance of **warrant** for a person's arrest; the warrants are granted by the Magistrate on solid grounds and not otherwise.

Warrant (= to authorize)

A 'general warrant' which does not contain the name of a person to be arrested is illegal.

Arrest without warrant:

The Police and Criminal Evidence Act 1984 provides distinction between arrest able offence for which no warrant of arrest is necessary and non-arrest able offences for which warrant of arrest is necessary. An arrest able offence is:

(i) Any offence for which the sentence is fixed by law; that is, murder and treason;
(ii) Offences carrying a penalty of five years or more imprisonment;
(iii) Various listed statutory offences.

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Article 10 of the Constitution of Pakistan 1973

(1) No person shall be detained in custody without being informed, as soon as may be, of the grounds of such arrest, nor shall be denied the right to consult, and be defended by a legal practitioner of his choice.
(2) Every person who is arrested and detained in custody shall be produced before a Magistrate within twenty four hours of such arrest, excluding the time necessary for the journey from the place of arrest to the court of nearest magistrate.
(3) Of Article 10, the conditions contained in clauses (1) and (2) of Article 10 do not apply to any person who is arrested or detained under any law providing for preventive detention

Persons to be dealt under the law of preventive detention:

Clause 4 of Article 10 provides that no law providing for preventive detention can be made except "to deal with persons acting is a manner **prejudicial** to the **integrity**, security or defense of Pakistan or external affairs of Pakistan or public order or the maintenance of supplies or services.

Prejudicial (= detrimental; harmful)
Integrity (=honor)

The article further provides that no such law shall authorize the detention of a person for a period exceeding three months unless the appropriate Review Board has afforded him an opportunity of being heard in person, reviewed his case and reported, before the expiration of the said period, that there is, in its opinion, sufficient cause for such detention, and if the detention is continued after the period of three months unless the appropriate Review Board has reviewed his case and reported before the expiration of each period of three months, that there is, in its opinion, sufficient cause for such detention.

Definition of appropriate Review Board:

A Board, in the case of a person detained under Federal Law, appointed by the Chief Justice of Pakistan and consisting of a Chairman and two other persons, each of whom is or has been a Judge of the Supreme Court or a High Court; and in the case of a person detained under Provincial Law, a Board appointed by the Chief Justice of the High Court concerned and consisting of a Chairman and two other persons each of whom is or has been Judge of a High Court.

The opinion of Review Board is "expressed in terms of the views of the majority of its members".

Communication of grounds of preventive detention:

Under clause (5) of Article 10, " When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, within fifteen days from such detention communicate to such person the grounds on which the order has been made, and shall afford him the earliest opportunity of making a representation against the order; provided that the authority making any such order may refuse to disclose facts which such authority considers it to be against the public interest to disclose".

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Furnishing of documents to Review Board:

Under clause (6) of Article 9, it is incumbent on the authority making the order to furnish to the appropriate review Board all documents relevant to the case unless a certificate, signed by a Secretary to the Government concerned, to the effect that is not in the public interest to furnish any documents, is produced.

Maximum limit for period of detention

Clause 7 of Article 9 provides that within a period of **twenty four months** commencing on the day of his first detention in pursuance of an order made under a law providing for preventive detention, no person shall be detained in pursuance of any such order for more than a total period of **eight months** in the case of a person acting in a manner prejudicial to the public order and **twelve months** in any other case. However this condition does not apply to any person who is employed by, or works for, or acts on instructions received from the enemy or who is acting or attempting to act in manner prejudicial to the integrity, security or defence of Pakistan or any part thereof or who commits or attempts to commit any act which amounts to an anti-national activity as defined in Federal Law or is a member of any association which has for its objects, or which indulges in, any such anti-national activity.

Rights of arrested persons:

There are four constitutional rights of an accused person:

(1) He shall not be detained in custody without being informed, as soon as may be, of the grounds of his arrest.
(2) He shall have the right to consult and to be represented by a lawyer of his own choice.
(3) He has a right to be produced before the nearest Magistrate within 24 hours of his arrest and in computing this period, the time spent on journey from the place of arrest to the court of the magistrate is to be excluded.
(4) He is not to be detained in custody beyond the said period of 24 hours without the authority of the court.

Writ of habeas corpus against the persons found illegally detained by public authority:-

High court can issue directions in the nature of habeas corpus if a person is found to be illegally detained by Police.

An order in the nature of habeas corpus is intended to preserve the liberty of the subject and is a safeguard against unlawful or improper manner of detention.

Where no criminal case of any type is registered against the detenue or he is handcuff and fetter without any entry in the Roznamcha relating to his arrest or the detenue is not the accused in FIR or is found confined in the precinct of the Police Station without entering his arrest in daily diary.

Proceedings in habeas corpus petition are summary in character.

Who can file writ of habeas corpus?

Article 199 of the Constitution make clear that writ of habeas corpus need not to be sought necessarily by an aggrieved person. Petitioner being as Advocate and a Director of Human Rights Organization was even competent and had locus standi to file writ of habeas corpus.

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Lecture 20

Fundamental Rights----(1) Protection Against Double Punishment

Protection against double punishment:

Article 13 (a) of the Pakistan Constitution 1973 provides that "no person shall be **prosecuted** or punished for the same offence more than once".

Prosecuted (= to put on trial)

The Article 13 (a) raises to constitutional status the principle of " autrefois convict" and "autrefois acquit" embodies in section 403 of the Code of Criminal Procedure 1898 which provides that a person who has once been tried by a Competent Court for an offence and **convicted** or **acquitted** of such offence, shall while such conviction or acquittal remains in force, not be liable to be tried again for the same offence nor on the same fact for any other offence for which a different charge from the one made against him might have been made under Section 236 or for which he might have been convicted under Section 237 of the Code of Criminal Procedure 1898.
Convicted (= found guilty)
Acquitted (= not found guilty)

The principle also finds place in a modified form in Section 26 of the General Clauses Act, 1897 which provides that where an **act** or **omission** constitutes an offence under two or more **enactments**, then the offender shall be liable to be prosecuted and punished under either or anyone of those enactments but shall not be liable to be punished twice for the same offence.

Act (= do something)

Omission (=laps; slip)

Enactments (= Laws made by Parliament)

These provisions, however, not **bar** subsequent trial for a 'distinct' or 'different' or 'other' offence as described in subsections (2) & (3) of Section 403 of the Criminal Procedure Code 1898.

Bar (= stop)

Rule against double jeopardy:

This principle is described by Americans as the rule against double **jeopardy** which is based on the Common Law maxim: 'nemo debet bis vexari pro una et eadem causa'. When a criminal charge has been once **adjudicated** upon by a Court of competent jurisdiction, that adjudication is final, whether it takes the form of an acquittal or a conviction.

Jeopardy (= trouble)

Adjudicated (= decision given)

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Article 13 (a) of the Pakistan Constitution also follows the American and the Common Law rule by providing that "no man shall be prosecuted or punished for the same offence more than once.

Dr.Nasim Hassan Shah, J. of the Supreme Court of Pakistan in Alamdar Hussain v. Abdul Baseer Qureshi PLD. 1978 S.C. 121 held that the word: **'prosecution'** in Article 13 (a) of Pakistan Constitution includes 'punishment' with the result that fresh prosecution for the same offence would be barred only where prosecution finally concluded and ended either in acquittal or conviction.

According to Muhammad Munir (Constitution of the Islamic Republic of Pakistan Ed. 1975 p.128) Article 13 (a) " raises to a constitutional status the principle of authrofois convict and autrefois acquit embodied in section 403 of the Code of Criminal Procedure 1898 and a part of Section 132 of the Evidence Act 1872. He further says, "the present Article prohibits both double prosecution and double punishment for the same offence".

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Lecture 21

Fundamental Rights---- Protection Against Self Incrimination

Protection against Self Incrimination

Article 13 (b) of the Constitution of Pakistan 1973 provides that "no person shall, when accused of an offence, be compelled to be a witness against himself".

This provision embodies the principle of protection against compulsion which is one of the fundamental canons of the British system of criminal jurisprudence.

And the same has been adopted by the American system and incorporated in the Federal Constitution. The fifth amendment of the American Constitution provides that "no person shall be compelled in any criminal case to be a witness against himself.

Article 44 of Qanun-e-Shahdat, 1984 lays down that "all accused, including an accomplice, shall be liable to cross-examination". Both these provisions in so far as they make an accused person compellable witness and liable to compulsory cross examination are **ultra vires** Article 13 of the Constitution, for if any law compels an accused person to give evidence and such evidence will tend directly or indirectly to be self incriminatory, that law to that extent will be unconstitutional by reason of this Article.

Ultra vires (=going beyond the limit)

Who is given protection under Article 13?

The protection conferred by Article 13 is confined only to an accused person, that is a person, against whom a formal accusation relating to the commission of an offence has been leveled which in the normal course may result in the **prosecution**, and the mere lodging of information or conducting investigation against a person does not make him an accused person.

Prosecution (=trial; hearing before a court)
Accused (=on whom blamed is laid upon)

It is not necessary in order to avail the protection that actual trial should have commenced before the Court. A person against who an **F.I.R**. has been lodged and investigation ordered can claim the benefit of the protection because he is an accused person.

F.I.R (=First Information Report)

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Enforcement of Fundamental Rights:

Provision of Article 199 (2) and 184 of the Constitution have set the superior courts with the responsibility to enforce the fundamental rights in case of complaint about their violation. **Aggrieved** citizens on the basis of the rule **ex debito justitae** as a matter of right can claim the redress of his grievance and for the enforcement of his fundamental rights and there is little room for the discretion left in such cases.

Aggrieved (=distressed; upset; annoyed)

The aim of having declaration of fundamental rights in the Constitution is that such rights should be regarded as inviolable under all conditions.

According to Clause (1) (C) of this Article the Fundamental rights guaranteed in the Constitution are not mere a **pious enunciation** of the principle on which the constitution is based but are made specifically justifiable in the clause under reference. They are not liable to be **abridged** by any legislative or executive orders except by virtue of the provisions of the Constitution.

Pious (=virtuous)

Enunciation (=articulation)

Abridge (=shorten)

Law denying fundamental right:

Where an order is passed by the Government which amounts to denial of fundamental rights, the court must grant proper relief to the party. It cannot refuse relief on the ground that the Government could amend the law to bring it in conformity with fundamental rights.

Power of the High Court to issue directions, orders and writs is not limited to the writs but extend to making of order restraining or directing any authority or Government discharging executive function.

High court while enforcing fundamental rights is competent to direct that monetary compensation be paid to the victim of violation of Fundamental Rights.

Constitutional jurisdiction of High Court under Article 199 could not be invoked by anyone who was guilty of bad faith and of unconscionable conduct. Right was in the nature of ex debito justitiae, but would only be granted if the petitioner could show that their conduct was not such as to disentitle him of such relief.

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Lecture 22

Fundamental Right---Inviolability of Dignity of Man

Article 14 of the Pakistan Constitution of 1973 provides that "the **dignity** of man and, **subject to law**, privacy of home, shall be **inviolable.**

Dignity (=self respect)

Subject to law (=having regard to the law)

Inviolable (=sacred; unchallengeable; unbreakable)

Thus Article 14 of the Pakistan Constitution of 1973 provides that "the respect of man and, having regard to the law, privacy of home, shall be unchallengeable.

The Article further provides that "no person shall be subjected to **torture** for the purpose of **extracting evidence"**.

Torture(=pain; suffering)

Extract (=take out; pull out)

Evidence (= something that tends to prove or disprove the existence of an alleged fact)

Thus the article further provides that "no person shall be subjected to pain or infliction for the purpose of taking out something that tends to prove or disprove the existence of an alleged fact.

The Article is divided in to three parts. The first part declares the dignity of man to be unbreakable. The second part makes the privacy of home inviolable but this part is subject to law whereas the first part is not. The third part **prohibits** torture for the purpose of extracting evidence.

Prohibit (=ban)

Dignity of Man

Any law that violates the dignity of man will be unconstitutional.

What law amounts to violation of a dignity of a man?

Every law which provides inhuman and cruel punishments are violative of dignity of man, as for instance, whipping, solitary confinement, barbarous invasion on human personality. Even hanging may be considered a violation of human dignity.

Note: In some countries capital punishment has been abolished on the ground that it is inhuman. Supreme Court held that the dignity and self respect of every human being has become inviolable and this guarantee is absolute.

Chief Justice Supreme Court Dr. Nasim Hassan Shah in the matter of public hanging held in a case that "executing in public even the worst criminal violates the dignity of man, and therefore a law authorizing public hanging is unconstitutional.

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Continuation on dignity of man

In every system of law, all **unusual, cruel** and inhuman punishments are constitutionally declared as **violative** of human dignity.

Unusual (= strange; odd)

Cruel (=unkind; malicious)

Violative (=against)

Thus in every system of law, all strange, unkind and inhuman punishments are constitutionally declared as against of human dignity.

On the view that the **contemporary** society takes of such punishments, the chopping off the hands and feet of **convicts** is considered cruel and inhuman because it involves torture, acute pain and **lingering** death.

Contemporary (= present day)

Convict (=judicially pronounced guilty)

Lingering (= lasting)

The Universal Declaration of Human Rights of 10 December 1948, to which Pakistan is a party, provides in its Article 5 that " no one shall be subjected to torture or to cruel**,** inhuman or degrading treatment or punishment".

Universal Declaration of Human Rights in Islam Relating Dignity of Man

Universal Declaration of Human Rights in Islam of 12 April 1980 states in its Article 7 that "it is not permitted to torture the criminal, still less the suspect: God will inflict punishment on those who have inflicted torture in the world".

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Lecture 23

Fundamental Right---Inviolability of Dignity of Man and Privacy of Home

Privacy of Home

Article 14 of the Pakistan Constitution of 1973 provides that "the **dignity** of man and, **subject to law**, privacy of home, shall be **inviolable.**

Dignity (=self respect)

Subject to law (=having regard to the law)

Inviolable (=sacred; unchallengeable; unbreakable)

Thus Article 14 of the Pakistan Constitution of 1973 provides that "the respect of man and, having regard to the law, privacy of home, shall be unchallengeable.

The Article also protects the privacy of home but this protection has been made subject to law. It does not mean that the guarantee can be taken away by law. It only means that the rights of privacy may be regulated by law, for example, a Police official may be permitted by law to enter a house for making an arrest or a search, tapping and stealthily photographing something inside the house are invasion on privacy.

Torture means infliction or pain to human beings. Torture for obtaining confession is prohibited both by this Article and the general law of the land. But still Police inflicts variety of torture on the suspects. Example are keeping a suspect awake all night, laying him on ice slab, hanging him from the ceiling with head downwards etc. are done by Police to extract evidence.

In England, torture was recognized as a part of Criminal Procedure and was acknowledged as such by the various Acts of the English Parliament. In 1689 efforts were made to curb it and the "Claim of Right" was enacted where under the use of torture in petty cases the same without evidence was declared illegal.

The various types of implements and instruments employed in torture amply demonstrate the crooked ingenuity of their inventors and users. Of them, the iron bars and Thumb kins are still remembered in Europe with certain amount of fear and chilling sensation.

In England it was only during the days of Queen Anne that torture was finally **abolished** by an Act of Parliament.

Abolished (= eradicated)

In our country torture is prohibited by various laws. For instance under section 163 (1) of the **Code** of Criminal Procedure 1898 " no police officer or any person in authority shall offer or make any inducement, threat or promise for obtaining a confession.

Code (=a complete system of positive laws, carefully arranged and officially promulgated)

Under Section 348 of the Pakistan Penal Code 1860, it is an offence to wrongfully **confine** a person for the purpose of **extracting** a **confession** from him.

Confine (=detain in prison)

Extracting (= taking)

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Confession (= declaration of guilt)

Article 38 of the Qanun-e-Shahdat 1984 states that a confession that has been made to a Police Officer is **inadmissible** as evidence against the maker.

Inadmissible (= not allowed; disallowed)

Remedy for the enforcement of the fundamental rights:

What is meant by "remedy"?

Remedy is the means of enforcing a right or preventing a wrong.

What remedy is available where executive action questions dignity of man and privacy of home?

Remedy for the enforcement of "dignity of man and privacy of home" is filing a writ of prohibition.

Meaning of the writ of prohibition:

Allow or order that forbid a certain action.

Forbid (= stop; ban)

Writ of prohibition is an extraordinary writ issued by an appellate court to prevent a lower court from exceeding its jurisdiction or to prevent a non-judicial officer or entity from exercising a power.

No person could be arrested by the Police or any other agency except in accordance with law for the purpose of investigation of a criminal case. Where it is found that Police or other agency is doing an action against the law and **contrary** to the fundamental rights of citizen, than a writ of prohibition may be filed with the court.

Contrary (= opposite)

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Lecture 24

Fundamental Rights----(1) Freedom of Movement etc. (2) Freedom of Assembly

1. Article 15 of the Constitution of Pakistan 1973 provides that "every citizen shall have the right to **remain** in, and **subject to** any **reasonable restriction** imposed by law in the **public interest**, enter and move freely throughout Pakistan and to reside and settle in **any part thereof**.
   Remain (= stay; continue) **Subject to**

   (=having regard to) **Reasonable** (=

   logical; practical; sensible) **Restriction** (=

   limitations; control)

   Public interest (= community concern)

   Any part thereof (= any part of Pakistan)

Thus Article 15 of the Constitution of Pakistan 1973 provides that "every citizen shall have the right to stay in Pakistan, and as per any logical controls imposed by law in the public interest entered and move freely throughout Pakistan and to reside and in any part of Pakistan.

Under Article 15 of the Constitution of Pakistan 1973, every citizen has the right to remain in the country. This right is **absolute** and **unqualified**.

Absolute (= fixed; supreme)

Unqualified (= without qualifications)

What is the objective of freedom of movement?

A citizen cannot be banished from the country; his right to step in, step out from the country, move freely throughout Pakistan, reside and settle in any part of Pakistan is subject to **reasonable restrictions** imposed by law.

Reasonable (=logical; sensible)

Restriction (=check; limitation)

In Abul Ala's Maudoodi vs. the State Bank of Pakistan.PLD 1969 Lah. 908, Muhammad Akram, J. held that the purpose behind this safeguard "is to remove all territorial barriers within the country for the citizens of Pakistan. It is designed to be a check against provincialism, regional discrimination and all **parochial** considerations.

Parochial (=narrow-minded)

To a citizen of Pakistan, the whole of his country, is his cherished home freely and equally accessible to him subject to any reasonable restrictions imposed by law in the public interest, he is free to move about, settle and reside in any part of the territory throughout Pakistan.

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Externment or interment order

"Externment order" means "to leave a certain area"; internment order means "not to leave a certain area"; the both orders would, no doubt curtain the freedom of movement.

A law authorizing externment or internment to be a valid must fall within the limits of permissible legislation and the restrictions on the exercise of the right of freedom of movement must be reasonable and in public interest.

Freedom of Assembly

Freedom of Assembly includes taking part in public meetings, processions and demonstrations. Under English Law, all the freedoms including the freedom of assembly are in-fact liberties and not rights.

Freedom of assembly means that there is no law forbidding people to assemble. If a number of people choose to go to the same place at the same time, this is not unlawful, provided that they keep within the limits, of the law, individually and collectively.

An assembly convened for the purpose of affecting a breach of peace is unlawful at Common Law; and there are various statutory offences, notably under Public Orders Acts, Highways Acts, the Police Act 1964 and local bye-laws.

Britain is a party to the European Convention which provides that every one has the right to freedom of peaceful assembly.

Article 16 of the Constitution of Pakistan 1973 provides that "every citizen shall have the right to assemble peacefully without arms, subject to any **reasonable restrictions** imposed by law in the interest of public order'.

Reasonable (=logical; sensible)

Restrictions (=limitations)

US Supreme Court held that **"the very idea of a government, republican in form, implies a right on the part of citizens to meet peaceably for consultation in respect of public affairs".**

The fundamental right guaranteed to the citizens of Pakistan by the Constitution of Pakistan 1973 is to gather unarmed and for peaceful purposes, which can only be restricted by laws which have as their object the maintenance of public order. The restrictions imposed must be reasonable and in each case it is the court to decide whether the restriction is reasonable or not.

In deciding whether the restrictions are reasonable or not, the court will take in to consideration the conditions prevailing at the time, the extent and the duration of the restrictions and all the other surrounding circumstances.

In Abdul Hameed Qadri vs. D.M. Lahore P.L.D. 1957 Lah. 213, it was held that "the danger to human life and safety and the disturbance of the public **tranquility** fall within the purview of the expression "public order", and if an order is passed by the District Magistrate to prevent danger to human life and safety and the disturbance of public tranquility, it is an order passed in the interest of public order.

Tranquility (=harmony)

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Determining reasonableness of restrictions

In determining the reasonableness of restrictions, several circumstances shall have to be taken in to consideration, including the conditions prevailing at that time, and the nature, extent and duration of the restrictions of the fundamental rights having regard to all the surrounding circumstances, the restriction imposed may be quiet unreasonable, while in a different set of circumstances that may be reasonable.

There cannot be laid down any **absolute** and fixed standard by which the reasonableness of restrictions upon fundamental rights may be tested but it can be safely assumed that in judging the same an objective standard i.e. the standard of the average prudent man shall have to be applied.

Absolute (=complete; utter)

The concept of reasonableness is nothing but that of harmonizing individuals right with collective interest.

Freedom of assembly in the state of national emergency.

Freedom of assembly may be restricted to a greater extent in time of national emergency than in normal times. The restriction should be certain and well defined and imposed directly by law rather than by the **discretionary** authority or the Police or other executive authority.

Discretionary (=optional)

In Nawab Zada Nasrullah Khan vs. Government of West Pakistan, P.L.D. 1965 Lah.642 in which it was ruled that freedom of assembly is not in its nature absolute. It is a relative right subject to imposition of reasonable restrictions with necessary conditions to safeguard the public interest.

But according to American Law, there must be **grave** and immediate danger to the interest of the public order to restrict the right.

Grave (=serious)

In other words any attempt to restrict freedom of assembly must be justified by clear public interest threatened, not doubtfully or remotely, but by clear and present danger and only the gravest abuses, endangering **paramount** interests, give occasion for permissible limitation on the right.

Paramount (= supreme; dominant)

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Lecture 25

Fundamental Right---Freedom of Association

Meaning of the phrase 'Freedom of Association':

Freedom of **association** means forming and belonging to political parties, trade unions, societies and other organizations.

Freedom (=liberty; choice; independence)

Association (=union; alliance; connection)

A person is at liberty to join an association **provided** it does not amount to criminal conspiracy under the criminal law.

Provided (=proviso which may bring addition or condition or exception to whatever is said earlier)

Conversely speaking no one is obliged by law to join any association against his will.

Conversely (= on the contrary; in opposition; on the other hand)

Article 17 of the Constitution of Pakistan, 1973

Article 17 of the Constitution of Pakistan, 1973 provides that (1) every citizen shall have the right to form associations or unions, **subject to** any **reasonable restrictions** imposed by law in the interest of **sovereignty** or **integrity** of Pakistan.

Subject to (= having regard to)
Reasonable (=logical; rational; sensible)
Restrictions (=limitations)
Sovereignty (= supreme authority or rule)
Integrity (=honor)

Thus Article 17 of the Constitution of Pakistan 1973 provides that (1) every citizen shall have the right to form associations or unions having regard to any logical or rational or sensible limitations imposed by law in the interest of supreme authority or honor of Pakistan.

And (2) " every citizen, not being in the service of Pakistan, shall have the right to form or be a member of political party, **subject to** any **reasonable restrictions** imposed by law in the interest of the **sovereignty** or **integrity** of Pakistan and such law shall provide that where the Federal Government declares that any political party has been formed or is operating in a manner **prejudicial** to the **sovereignty** or **integrity** of Pakistan, the Federal Government shall, within fifteen days of such **declaration**, refer the matter to the Supreme Court whose decision on such **reference** shall be final"

Subject to (= having regard to)
Reasonable(= logical; sensible; rationale)
Restrictions (= limitations)
Prejudicial (= detrimental; harmful)
Sovereignty (= supreme authority or rule)
Integrity (= honor)
Declaration (= assertion; affirmation)
Reference (= suggestion)

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Thus every citizen, not being in the service of Pakistan, shall have the right to form or be a member of political party, having regard to any logical limitations imposed by law in the interest of the supreme rule or honor of Pakistan and such law shall provide that where the Federal government declares that any political party has been formed or is operating in a manner detrimental to the sovereignty and honor of Pakistan, the Federal Government shall, within fifteen days of such declaration, refer the matter to the Supreme Court whose decision on such reference shall be final.

Three freedoms guaranteed by Article 17

The Article 17 provides for the following three freedoms:

(1) Freedom to form association;
(2) Freedom to form unions;
(3) Freedom to form political parties.

The first two freedoms under the Pakistan Constitution namely freedom to form association and freedom to form union are subject to reasonable restrictions imposed by law in the interest of sovereignty or integrity of Pakistan, public order or morality. But third freedom is subject only to reasonable restrictions imposed by law in the interest of sovereignty or integrity of Pakistan.

The right to form associations, unions and political parties for lawful purposes flows from the right to **freedom of movement, the right to enter upon lawful profession or occupation, the right to freedom of speech and expression and the right to freedom of religion.**

What a person may legally do alone, he may do this with the assistance and cooperation of others. Individuals has right to organize themselves in to parties and even in to special group to advance cause and to circulate their views and difficulties and to advocate their cause in public assemblies. It is only when people combine together for illegal purposes that the law prohibits their association and creates **vicarious liability** for acts done by the others.

Vicarious liability (= liability that a supervisory party (such as an employee) bears for the actionable conduct of a subordinate or associate (such as an employee) based on the relationship between the two parties.)

Objects of Associations

An association may take the following form:

(1) Political party
(2) Company
(3) Institute
(4) Firm
(5) Union
(6) Society
(7) club

Documents containing aims and objects

When persons combine together for a common object,, they generally set out their aims and objects in a document and set up some kind of organizational structure to regulate their activities. They may associate for a political, economic or social purposes or their object may be no more than the promotion of science, religion, art, culture, literature or charity. So long as the purpose for which they associate is lawful, law imposes no restriction on their association.

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The right to freedom of association is, therefore subject to this important qualification that reasonable restriction on its exercise may be imposed by law in the interest of morality or public order or the sovereignty or integrity of Pakistan.

Thus association, the object of which is to advocate or carry on some immoral purpose for example gambling or illegal activity or over throwing the Government by unlawful means may be prohibited by law.

The dissolution of Imdadi companies by the Undesirable Companies Act 1958 was upheld by the Lahore High Court in Progress of Pakistan Co. Ltd. Vs. Registrar Joint Stock Companies P.L.D. 1958. Lah.887. on the ground that the Companies encouraged immoral gambling.

In Abul A'la Maudoodi vs. Government of West Pakistan P.L.D 1964 S.C 673—Section 16 of the Criminal Law Amendment Act 1908 which authorize the Provincial Government to declare an association unlawful, if in its opinion it has its object interference with the maintenance of law and order, was held to be an unconstitutional interference with the right of freedom of association on the ground that the provision gives to the provincial government an arbitrary and unqualified power to declare an association unlawful, the making of the declaration depending upon the subjective satisfaction of the Government. It was held that the question whether a restriction is reasonable or unreasonable is for the court to determine and, in determining it, the Court has to examine not only reasonableness of the law but also the reasonableness of the mode of application of restriction whether such mode be prescribed by law or not.

Deputing person to attend meeting in violative of Rights:

In Nawabzada Nasrullah Khan vs. Government of West Pakistan P.L.D. 1965 Lah. 642, it was held that a law which authorizes a District Magistrate to **depute** a person to attend a public meeting for the purpose of causing a report to be made of its proceedings and direct the person convening or conducting the meeting to admit the person so deputed, is an unjustified invasion of the right of free assembly and association.

Depute (= assigned; allocated)

Compulsory registration and rendition of accounts by political parties:

Compulsory registration of political parties is violative of Article 17 (2) of the Constitution 1973 but the provisions regarding the **rendition** of accounts for the purpose of audit by the political parties are in **consonance** with Article 17 (3) which provides that every political party shall account for the source of its funds in accordance with law.

Rendition (= act of delivering something))

Consonance (= in compliance with; in accordance with)

This principle was illustrated by Benazir Bhutto vs. Federation of Pakistan P.L.D. 1988 S.C. 416, it was held that Article 17 (3) requires every political party to account for the sources of its funds in accordance with law. The purpose obviously is to seek out foreign aided parties whose activities are prejudicial to the interest of sovereignty or integrity of Pakistan as the sources of funds provides a guideline amongst others, in determining the true character of a political party and the nature of its activities.

Writ Jurisdiction of High Court

Provisions of Article 199 are not confined to cases where the persons against whom the order is proposed to be passed has been performing judicial or quasi judicial functions. Administrative or executive authorities also fall within the orbit of the jurisdiction conferred by this Article on the superior courts.

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Article 199 is very wide in scope, and has been introduced to correct the actions of Government functionaries which suffer either from lack of jurisdiction or excess of jurisdiction. This article is an omnibus article under which relief can be granted to the citizens of the country against infringement of any provision of law or of the constitution. If the citizens of this country are deprived of the guarantee given to them under the Constitution illegally, or not in accordance with law, then Article 199 can always be **revoked** for redress.

Revoked (=cancelled)

High Court on application of an aggrieved party has power to make an order directing a person performing, within territorial jurisdiction of High Court functions in connection with affairs of Federation , Province or a Local authority to refrain from doing anything against the fundamental rights conferred by the Constitution of Pakistan 1973

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Lecture 26

Fundamental Right-----(1) Freedom of Trade, Business or Profession (2) Safeguards Against Taxation for the Purposes of any Particular Religion.

Article 18 of the Pakistan Constitution 1973 provides that " **subject to** such **qualifications**, if any, as may be prescribed by law, every citizen shall have the right to enter upon any **lawful profession** or **occupation** and to conduct any lawful **trade** or business:

Subject to (=having regard to)
Qualification (= prerequisites; criterion)
Lawful (=permitted by law)
Profession (= line of work; career)
Trade (= buying & selling)

Thus Article 18 of the Pakistan Constitution 1973 provides that having regard to such prerequisites or criterion, if any, as may be prescribed by law, every citizen shall have the right to enter upon any permitted by law career or occupation and to conduct any lawful buying and selling or business.

Provided that nothing in this Article shall prevent

(a) The **regulation** of any trade or profession by a **licensing** system; or
(b) The regulation of trade, commerce or industry in the interest of free competition **therein**; or
(c) Carrying on, by the Federal Government or a Provincial Government, or by a corporation controlled by any such Government, of any trade, business, industry or service to the **exclusion**, **complete**, or **partial,** of other persons.

Provided (=proviso; adds condition or exception or addition to whatever is said earlier
Regulation (= parameter)
Licensing system (= authorization system)
Exclusion (=keeping out; leaving out)
Complete (= total; whole)
Partial (= part)

Simple sense of the Fundamental Right: Freedom of Trade, Business or Profession

The sense of the fundamental right: Freedom of Trade, Business or Profession may be stated by saying that every citizen of Pakistan is entitled to engage himself in any lawful profession and occupation and do any lawful trade or business but the state may by law:

(i) Prescribe qualification for the practice of a profession, occupation, trade of business;
(ii) Regulate any trade or profession by a licensing system;
(iii) Regulate any trade, commerce or industry in the interest of free competition; and
(iv) Assume for it or grant to a Government controlled corporation, the monopoly, complete or partial, of any trade, business, industry or service.

Munir says the word: 'lawful' implies complete banning of profession etc.

Munir opined that the word: 'lawful' that occurs in the principal paragraph has the import of enabling the state completely to ban a profession, occupation, trade or business by declaring it to be unlawful. According to him

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"unlawful" in common **parlance** means anything forbidden by law and this is also the meaning assigned to it in law.

Parlance (= manner of speaking)

Therefore the right to enter upon a profession or occupation or to conduct any trade or business can hardly be described to be an unqualified constitutional right when such right may be denied by law.

In the case of East &West steamship Co. vs. Pakistan P.L.D 1858 S.C. 41, Cornelius, J. in the light of the provisions of the Control of Shipping Act, 1947 has made some observations which illustrate the concepts of "regulation", "license" and "licensing system" as under:

"……..I consider that the law constitutes a violation of the main provisions under Article 12, guaranteeing a right to conduct a **lawful** trade, and I consider also that a law expressed in the terms of the Control of Shipping Act relating to any trade cannot fall within the saving clause provided for regulation of trade by a licensing system…..

Lawful (=permitted by law)

Cornelius, J. also observed that "the freedom which the citizens had guaranteed to themselves is thus placed entirely at the disposal of the Executive to respect or destroy as it pleases.

Right to apply for license is a valuable right:

The fundamental right authorizes the regulation of any trade or profession by licensing system. The state therefore may by law direct that certain trades or professions will not be carried on except under a license and it may by license determine the place where and the time when certain business are to be conducted. But the right to apply for a license is not a fake but a valuable **right**, as held by Shamim Textile Mills vs. Republic of Pakistan P.L.D. 1972 and therefore a law may be attacked on the ground that the rule making power under it amounts to excessive delegation of legislative power.

Right (=an interest protected by law)

Government trading & monopolies:

Clause (c) of the Proviso to Article 18 of the Pakistan Constitution permits the Government or a Government controlled corporations to have a **monopoly** in any trade, business, industry or service. But the clause does not permit the State to **confer** any such **privilege** on a private person or a corporation, as any such measure would amount to an **ouster** of other citizens from the trade or industry.

Monopoly (=domination; cartel)

Confer (=bestow)

Privilege (=advantage)

Ouster (=expulsion)

On the other hand as would appear from proviso (b) to Article 10 the Government should, where a monopoly exists, regulate the trade on industry in the interest of free competition.

Safeguards against taxation for purposes of any particular religion.

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Article 21 of the Pakistan Constitution 1973 provides that "no person shall be compelled to pay any special **tax**, the **proceed** of which are to be spent on the **propagation** or maintenance of any religion other than his own.

Tax (impost; burden; charge)

Proceed (= revenue)

Propagation (= promulgation; spreading)

Thus Article 21 of the Pakistan Constitution 1973 provides that "no person shall be obliged to pay any special tax, the revenue of which are to be spent on the **promulgation** or maintenance of any religion other than his own.

Promulgation (=spread; proliferation)

In order to attract the provision of these articles, the **levy** must be a tax where the imposition is in the nature of a fee it does not fall within the prohibition of this article. There is no **generic** difference between a tax and a fee. Both are different forms in which the taxing power of a state manifests itself.

Levy (=charge)

Generic (= basic)

Tax is undoubtedly in the nature of a compulsory **exaction** of money by a public authority for public purposes the payment of which is imposed by law. Tax is a common burden and the only return which the tax payer get is the participation in the common benefits of the state. Fee on the other hand are payments primarily in the public interest but for some special services rendered or some special work done for the benefit of those from whom payments are demanded.

Exaction (=the act of demanding)

Writ Jurisdiction of High Court

Provisions of Article 199 are not confined to cases where the persons against whom the order is proposed to be passed has been performing judicial or quasi judicial functions. Administrative or executive authorities also fall within the orbit of the jurisdiction conferred by this Article on the superior courts.

Article 199 is very wide in scope, and has been introduced to correct the actions of Government functionaries which suffer either from lack of jurisdiction or excess of jurisdiction. This article is an omnibus article under which relief can be granted to the citizens of the country against infringement of any provision of awl or of the constitution. If the citizens of this country are deprived of the guarantee given to them under the Constitution illegally, or not in accordance with law, then Article 199 can always be revoked for redress.

High Court on application of an aggrieved party has power to make on order to directing a person performing, within territorial jurisdiction of High Court functions in connection with affairs of federation, province or a local authority to refrain from doing anything against the fundamental rights conferred by the Constitution of Pakistan 1973

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Lecture 27

Fundamental Right----Freedom of Speech, Expression and Press

Article 19 of the Pakistan Constitution, 1973 provides that " every citizen shall have the right to freedom of speech and expression, and there shall be freedom of the press, **subject to** any **reasonable restrictions** imposed by law in the interest of the **glory** of Islam or the **integrity**, security or defense of Pakistan or **any part thereof**, friendly relations with foreign states, public order, decency or morality, or in relation to **contempt of court**, **defamation, commission** of or **incitement** to an **offence**.

Subject to (= having regard to)

Reasonable (= logical;

sensible) **Restrictions**

(=limitations) **Glory**

(=grandeur)

Integrity (=honor)

Any part thereof (= any part of Pakistan)

Contempt of court (= the act of disrespecting the court)

Defamation (=the act of harming the reputation of other)

Commission of an offence (= act of doing an offence)

Incitement to an offence (=provocation to an offence)

Offence (= crime; violation of law)

Thus the Article 19 of the Pakistan Constitution, 1973 provides that " every citizen shall have the right to freedom of speech and expression, and there shall be freedom of the press, having regard to any logical limitations imposed by law in the interest of the grandeur of Islam or the honor, security or defense of Pakistan or any part of Pakistan, friendly relations with foreign states, public order, decency or morality, or in relation to act of disrespecting the court, act of harming the reputation of other, act of doing or provocation to do a crime.

Limitation on the freedom of expression

Limitation on the freedom of expression includes **treason**, **sedition**, **incitement** to **racial hatred**, official secrets, **contempt of court** or **Parliament** and **incitement** to **mutiny** or **disaffection** among the armed forces and Police. The other limitations are **defamation**, civil and criminal **seditious libel**, blasphemy, obscenity and the application of the **restrictions**, imposed by these areas of law on newspaper, wireless, television and theaters.

Treason (=disloyalty)
Sedition (=trouble making)
Incitement (=provocation)
Racial (= ethnic)
Hatred (= hate)

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Contempt of court (= act of disrespecting court)
Contempt of parliament (= act of disrespecting Parliament)
Mutiny (= revolt)
Disaffection (= hostility)
Defamation (=the act of harming the reputation of other)
Libel (=defamation by the medium of writing)
Restrictions (=limitations)

Thus Limitation on the freedom of expression includes disloyalty, trouble making, provocation to ethnic hate, official secrets, act of disrespecting court or act of disrespecting Parliament and provocation to revolt or hostility among the armed forces and Police. The other limitations are the act of harming the reputation of other, civil and criminal trouble making written defamation, blasphemy, obscenity and the application of the limitations, imposed by these areas of law on newspaper, wireless, television and theaters.

Scope of Freedom of Speech & Press

Alexander Hamilton said: "The **liberty** of press is the right to publish with **impunity,** truth, with good **motives**, for **justifiable ends** though reflecting on government, magistracy, or individuals".

Liberty (= freedom; independence)
Impunity (= exemption from punishment)
Motive (=intention; object)
Justifiable (= reasonable; acceptable)
Ends (=purposes)

Thus the freedom of press is the right to publish with exemption from punishment, truth, with good intentions for reasonable purposes though reflecting on government, magistracy, or individuals."

Freedom of speech and freedom of press are fundamental personal rights and liberties which are the corner stones of democratic institutions.

The liberty of the press is not confined to newspapers and periodicals but necessarily **embraces** pamphlets, leaflets and every sort of publication.

Embrace (=hold; grip)

The right to speech is not limited to public addresses, pamphlets or words of an individual, but it also embraces every form and manner of **dissemination** of ideas that appear best fitted to bring such idea and views to the attention of the **populace** and to the attention of those most concerned with them.

Dissemination (=propagation)

Populace (=public; population)

The privilege of free speech carries with it freedom of choice as to the mode of expression that may be employed; it includes of **mechanical** and **manual instrumentalities** of communication, such as press and banners as a natural and appropriate means of conveying information on matters of public concern, which may be protected under the Constitutional guarantee of free speech and press.

Mechanical (=motorized)

Manual (=physical)

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Instrumentalities (= appliances; electrical devices)

Importance of the freedom

The freedom of speech and expression means the right to express one's convictions and opinions freely by words of mouth, writing, printing, pictures or any other mode.

A democratic government attaches great importance to this freedom because without freedom of speech, the appeal to reason which is the basis of democracy cannot be made.

It is said that freedom of speech and of the press lays at the foundation of all democratic organizations, for without free political discussion on public education, so essential for the proper functioning of the process of popular government, is possible.

The Journal of the International Commission of Jurist states that it needs no emphasis that a free press, which is neither directed by the executive nor subjected to censorship, is a vital element in a free state; in particular, a free, regularly published, political press is essential in modern democracy.

The citizens called upon to make political decisions, must be comprehensively informed, know the opinions of others and be able to weigh them up against each other.

The press keeps the dialogue alive, it provides the information, adopts its own point of view, and thus works as a directive giving force to the public debate.

It stands as a permanent means of communication and control between the people and their elected representatives in Parliament and Government.

Reasonableness of Restrictions on freedom of speech and expression

The freedom of speech and expression, including the liberty of the press under Pakistan Constitution is subject to any reasonable restrictions that may be imposed by law in the interest of glory of Islam, the security of Pakistan, friendly relations with foreign states, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.

Reasonable restrictions under these heads can be imposed only by a duly enacted law and not by executive action.

An absolute test of reasonableness of restrictions cannot be laid down.

Test (=examination; check; analysis)

In Nawabzada Nasrullah Khan vs. Government of West Pakistan P.L.D. 1965.Lah.642, the Lahore High Court held that freedom of speech and press is not absolute at all times and in all circumstances, and it does not means that one can talk or distribute where, when and how one chooses.

The state can impose reasonable restrictions on the freedom of speech in the interest of friendly relations with foreign state. It is a recognized principle of international law that State in their relation with other States are responsible for the acts committed by persons within their jurisdiction.

In accordance with this principle the most modern systems of law have made provisions for the punishment of **libel** against the heads of foreign states.

Libel (= to defame someone in a permanent character)

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The English common Law punishes such libel on the ground that they **imperil** the peaceful relation of Her Majesty with foreign states.

Imperil (= put in danger)

A law which makes it an offence to publish any libel tending to degrade or expose to hatred or contempt any foreign prince, ambassador or other foreign dignitaries will fall within this expression and will be held valid provided that the restrictions are not unreasonable.

The freedom of speech and expression does not extend to indecent or immoral publications and utterances. But as this concept of decency and morality differ historically and geographically, the court must decide the matter in the light of the existing and generally accepted notions of decency and morality in a given society.

Contempt of Court

Article 204 of the Pakistan Constitution 1973 and the Contempt of Court Act 1976 make provisions and confer jurisdiction on the Supreme Court and the High Courts to punish any person who---

(a) Abuses, interferes with or obstructs the process of the Court in any way or disobeys any order of the court; or
(b) Scandalized the court or otherwise does anything which tends to bring the court or a judge in relation to his office in to hatred, ridicule or contempt; or
(c) Does anything which tends to **prejudice** the determination of a matter pending before the court; or
Prejudice (=bigotry; unfairness)
(d) Does any other thing which, by law constitutes contempt of court.

Writ Jurisdiction of High Court

Provisions of Article 199 are not confined to cases where the person against whom the order is proposed to be passed has been performing judicial or quasi judicial functions. Administrative or executive authorities also fall within the **orbit** of the jurisdiction conferred by this Article on the superior courts.

Orbit (=track; range; scope)

Article 199 is very wide in scope, and has been introduced to correct the actions of Government functionaries which suffer either from lack of jurisdiction or excess of jurisdiction. This article is an omnibus article under which relief can be granted to the citizens of the country against infringement of any provision of law or of the constitution. If the citizens of this country are deprived of the guarantee given to them under the Constitution illegally, or not in accordance with law, then Article 199 can always be invoked for redress.

High Court on application of an aggrieved party has power to make on order directing person performing, within territorial jurisdiction of High Court functions in connection with affairs of Federation ,Province or a local authority to refrain from doing anything against the fundamental rights conferred by the Constitution of Pakistan 1973

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Lecture 28

Fundamental Rights--- (1) Freedom to Profess Religion & to Manage Religious Institutions

(2) Safeguard as to educational institutions in respect of religion etc.

(3) Right to acquire and dispose of property

Article 20 of the Pakistan Constitution 1973 provides that **subject to law**, **public order** and **morality**,-

(a) Every citizen shall have the right to **profess**, **practice** and **propagate** his religion; and
(b) Every religious **denomination** and **every sect thereof** shall have the right to **establish**, **maintain** and **manage** its religious institutions.

Subject to law (= having regard to law)
Subject to public order (= having regard to public order)
Subject to morality (= having regard to morality)
Profess (=admit; acknowledge)
Practice (=follow; observe)
Propagate (= promulgate)
Denomination (= value)
Every sect thereof (= every division or faction of the religion)
Establish (=set up; found)
Maintain (=uphold; preserve)
Manage (= deal with; control)

Article 20 of the Pakistan Constitution 1973 provides that having regard to law, public order and morality:-
(a) Every citizen shall have right to acknowledge, follow and promulgate his religion; and
(b) Every religious value and every **faction** of the religion shall have the right to set up, uphold and control its religious institution.

Faction (=group; section)

Defining religion:

Religion includes all forms of belief in the existence of superior being exercising power over human being by **volition**, and imposing rules of conduct, with future rewards and punishments.

Volition (=will; wish)

Religion is a matter of **belief** and **doctrine**, concerning the human spirit expressed **overtly** in the form of **ritual** and **worship**.

Belief (= faith; conviction)
Doctrine (= set of guidelines)
Overtly (=explicitly)
Ritual (= practice)
Worship (= respect; adoration)

Thus religion is a matter of faith and set of guidelines concerning the human spirit expressed explicitly in the form of practice and adoration)

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The right of a man to entertain religious views as appeal to his individual **conscience**, without **dictation** or **interference** by any person or power, **civil** or **ecclesiastical**, is as fundamental in a free government as is the right to life and liberty.

Conscience (=sense of right and wrong)
Dictation (= notation)
Interference (= intervention)
Civil (=public)
Ecclesiastical (= priestly; church)

Thus the right to entertain religious views as appeal to sense of right and wrong, without notation or intervention by any power civil or priestly is a fundamental in a free government as is the right to life and liberty.

Subject to public order and morality

If a religion is immoral as, for instance, where it allows indecent exposure of human body, or its practice leads to public disorders, the legislature may step in to regulate the religion, practice and propagation.

So long as religious beliefs are held, professed and practiced in private, no question of public disorder can arise, but when they are practiced and propagated in public, by speeches, processions and placards and are accompanied by **denunciation** of other religions, they are bound to clash with the rights of the others, and thus lead to breaches of the peace.

Denunciation (= condemnation; criticism; censure)

It is for this consideration that the practice and propagation of religion is made subject to law.

The fundamental right in the Pakistan Constitution has been subjected to law. But it does not mean that it can be taken away by law.

It was held in Jibendra Kishore vs. East Pakistan that the very conception of a fundamental right is that it being a right guaranteed by the Constitution cannot be taken away by the law, therefore, in accordance with the principle that a constitution should receive liberal interpretation in favor of citizen especially with respect to those provisions which were designed to safeguard the freedom of conscience and worship, the words 'subject to law' cannot mean that the right to profess, practice and propagate religion may **completely be taken away by the law**, they should be interpreted as merely permitting the making of laws by which the manner in which religion is to be professed, practiced and propagated and the establishment, management and maintenance of religious institutions e.g., Waqf Alal-Aulad, may be regulated.

Fundamental Right ----Safeguard as to educational institutions in respect of religion etc.

Article 22 of the Constitution of Pakistan 1973 provides that
no person attending any educational institution shall be required to receive religious instruction, or take part in any religious ceremony, or attend religious worship, if such **instruction**, **ceremony** or worship relates to a religion other than his own.
Instruction (= teaching)
Ceremony (= ritual)

In respect of any religious institution, there shall be no **discrimination** against any community in the granting of exemption or concession in relation to taxation.
Discrimination (=inequality; favoritism)

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Subject to law no religious community or denomination shall be prevented from providing religious instructions for pupils of that community or denomination in any educational institution maintained wholly by the community or denomination, and

Subject to law no citizen shall be denied admission to any educational institution receiving aid from public revenue on the ground only of race, religion, caste or place of birth.

Nothing in this article shall prevent any public authority from making provisions for the advancement of any socially or educationally backward class citizens.

Fundamental right---Right to acquire and dispose of property

Article 23 of the Pakistan Constitution 1973 provides that "every citizen shall have the **right** to **acquire**, **hold** and **dispose of** property in any part of Pakistan, **subject to** the Constitution and any **reasonable restrictions** imposed by law in the public interest.

Right (=an interest protected by law)
Acquire (= buy; purchase)
Hold (=grasp)
Dispose of (= sell)
Subject to (= having regard to)
Reasonable (= logical; sensible) **Restrictions** (= limitations)

Thus Article 23 of the Pakistan Constitution 1973 provides that "every citizen shall have an interest protected by law to buy, grasp and sell the property in any part of Pakistan, having regard to the constitution and any logical limitations imposed by law in public interest.

Subject to the constitution
The right to acquire, hold and dispose of the property guaranteed to the citizen of Pakistan is subject to the following other provisions of the Constitution:

(1) Compulsory acquisition of land with compensation.
(2) The compulsory acquisition of land without compensation for preventing danger to life, property or public health or enemy property or evacuee property and the taking over of property acquired by unfair means and the management of property for a limited period in public interest.
(3) Compulsory acquisition of property without compensation for the purposes of—
    (a) Providing education and medical aid to all or any specified class of citizens; or
    (b) Providing housing and public facilities and services such as roads, water, supply, sewerage, gas and electric power to all or any specified class of citizen; or
    (c) Providing maintenance to those who, on account of unemployment, sickness, infirmity, or old age are unable to maintain themselves.

Writ Jurisdiction of High Court

Provisions of Article 199 are not confined to cases where the person against whom the order is proposed to be passed has been performing judicial or quasi judicial functions. Administrative or executive authorities also fall within the orbit of the jurisdiction conferred by this Article on the superior courts.

Article 199 is very wide in scope, and has been introduced to correct the actions of Government functionaries which suffer either from lack of jurisdiction or excess of jurisdiction. This article is an omnibus article under which relief can be granted to the citizens of the country against infringement of any provision of law or of the constitution. If the citizens of this country are deprived of the guarantee

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given to them under the Constitution illegally, or not in accordance with law, then Article 199 can always be invoked for redress.

High Court on application of an aggrieved party has power to make on order to directing person performing, within territorial jurisdiction of High Court functions in connection with affairs of Federation , Province or a local authority to refrain from doing anything against the fundamental rights conferred by the Constitution of Pakistan 1973

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Lecture 29

Fundamental Rights----(1) Protection of Property Rights (2) Non-Discrimination in Respect of Access to Public Places (3) Safeguard Against Discrimination in Services (4) Preservation of Language, Script & Culture

Article 24 of the Pakistan Constitution provides that (1) no person shall be **compulsorily deprived** of his property **save** in accordance with law.

Compulsorily (= by force; under duress)
Deprived (=dispossessed; run down; set aside)
Save (=except)

Thus Article 24 of the Pakistan Constitution provides that no person shall be by force dispossessed of his property except in accordance with law.

No property shall be **compulsorily acquired** or taken **possession** of **save** for a public purpose, and save by the authority of law which provides for **compensation thereof** and either fixes the amount of compensation or specifies the principles on and the manner in which compensation is to be determined and given.

Compulsorily (= by force; under duress)
Acquire (= purchase)
Possession (= control; custody)
Save (=except)
Compensation (= recompense; payment)
Thereof (= of the property)

Thus no property shall be by force purchased or taken control of except for a public purpose and except by the authority of law which provides for payment of the property and either fixes the amount of compensation or specifies the principles and the manner in which compensation is to be determined and given.

Nothing in this Article shall affect the validity of any law permitting the compulsory acquisition or taking possession of any property for preventing danger to life, property or public health.

Nothing in this Article shall affect the validity of any law permitting the taking over of any property which has been acquired by, or come in to the possession of, any person by any **unfair means**, or in any manner, **contrary** to law.

Unfair (=unmerited; unjust; unreasonable)
Means (=earnings; resources)
Contrary (=against)

Nothing in this Article shall affect the validity of any law relating to the acquisition, administration or disposal of any property which is deemed to be enemy property or evacuee property under any law.

Nothing in this Article shall affect the validity of any law providing for the taking over of the management of any property by the State for a limited period, either in the public interest or in order to secure the proper management of the property, or for the benefit of its owner.

Nothing in this article shall affect the validity of any law providing for the acquisition of any class or property for the purpose of providing education and medical aid to all or any specified class of citizens.

Nothing in this article shall affect the validity of any law providing for the acquisition of any class or property for the purpose of providing housing and public facilities and services such as roads, water supply, sewerage, gas and electric power to all or any specified class of citizens.

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Nothing in this article shall affect the validity of any law providing for the acquisition of any class or property for the purpose of providing maintenance to those who on account of unemployment, sickness, infirmity or old-age, are unable to maintain themselves.

Fundamental Right-----Non-Discrimination in Respect of Access to Public Places

Article 26 of the Pakistan Constitution, 1973 provides that no person attending any educational institution shall be required to receive **religious instruction**, or take part in any **religious ceremony**, or attend **religious worship**, if such instruction, ceremony or worship relates to a religion other than his own.

Religious instructions (= holy teachings or holy lessons)
Religious Ceremony (= holy ritual; holy service; holy observance)
Religious Worship (=holy devotion)

Thus Article 26 of the Pakistan Constitution 1973 provides that no person attending any educational institution shall be required to receive holy lessons, or take part in any holy ritual, or attend holy devotion, if such instruction, ceremony or worship relates to a religion other than his own.

Article 26 of the Pakistan Constitution 1973 provides that in respect of any religious institution, there shall be no **discrimination** against any **community** in the **granting** of **exemption** or **concession** in relation to taxation.

Discrimination (= bias)
Community (= group of people)
Granting (=conferring; giving way)
Exemption (=immunity; exception)
Concession (=allowance)

Thus article 26 of the Pakistan Constitution 1973 provides that in respect of any religious institution, there shall be no bias against any group of people in conferring of immunity or allowance in relation to taxation.

Subject to law no **religious community** or denomination shall be prevented from providing **religious instruction** for **pupils** of that community or denomination

Subject to law (=having regard to law)
Religious community (= holy group of people)
Religious instruction (= holy lessons)
Pupil (=taught)

Thus having regard to law, no religious group of people or denomination shall be prevented from providing religious lessons for taught of that group of people or denomination.

Subject to law no citizen shall be denied admission to any educational institution receiving aid from public revenues on the ground only of race, religion, caste or place of birth

Nothing in Article 26 shall prevent any public Authority from making provision for the advancement of any socially or educationally backward class of citizens.

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Fundamental Right---Safeguard against Discrimination in Services

Article 27 of the Pakistan Constitution 1973 provides that no citizen otherwise qualified for appointment in the service of Pakistan shall be discriminated against in respect of any such appointment on the ground only of race, religion, caste, sex, residence or place of birth.

Provided that, for a period not exceeding (twenty) years from the commencing day, posts may be reserved for persons belonging to any class or area to secure their adequate representation in the service of Pakistan

Provided (=proviso that brings addition or condition or exception to whatever is said earlier)

Provided further that in the interest of the said service, specified posts of service may be reserved for members of either sex if such posts or services **entail** the performance of duties and functions which cannot be adequately performed by members of the other sex.

Entail (=demand; require)

Nothing in the clause (1) shall prevent any Provincial Government, or any local or other authority in a Province, from prescribing, in relation to any post or class of service under that Government or authority, conditions as to residence in the Province, for a period not exceeding three years, prior to appointment under that Government or authority.

Fundamental Right----Preservation of Language, Script & Culture

Article 28 of the Pakistan Constitution provides that "**subject to** Article 251, any **section of citizens** having a **distinct** language, script or culture shall have the right to preserve and promote the same and ,**subject to law**, establish institution for that purpose.

Subject to (=having regard to)
Section of citizens (= segment of citizen)
Distinct (= different; dissimilar)
Subject to law (=having regard to law)

Thus Article 28 of the Pakistan Constitution provides that having regard to Article 25, any segment of citizens having a different language, script or culture shall have the right to preserve and promote the same and having regard to law, establish institution for that purpose.

The National Language of Pakistan is "Urdu" but the English Language may for the time being be used for official purpose.

This Article does not entitle a person or community speaking a regional language to claim that the University operating in his or its area should make such language one of the media of examination any section of citizens, however, have the right to promote their distinct language, script or culture and for the purpose to establish the necessary institutions.

Writ Jurisdiction of High Court

Provisions of Article 199 are not confined to cases where the person against whom the order is proposed to be passed has been performing judicial or quasi judicial functions. Administrative or executive authorities also fall within the orbit of the jurisdiction conferred by this Article on the superior courts.

Article 199 is very wide in scope, and has been introduced to correct the actions of Government functionaries which suffer either from lack of jurisdiction or excess of jurisdiction. This article is an omnibus article under which relief can be granted to the citizens of the country against infringement of any provision of awl or of the

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constitution. If the citizens of this country are deprived of the guarantee given to them under the Constitution illegally, or not in accordance with law, then Article 199 can always be revoked for redress.

High Court on application of an aggrieved party has power to make on order to directing a person performing, within territorial jurisdiction of High Court functions in connection with affairs of federation , province or a local authority to refrain from doing anything against the fundamental rights conferred by the Constitution of Pakistan 1973

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Lecture 30

Fundamental Rights---Equality of Citizens

Article 25 of the Pakistan Constitution, 1973 provides that all citizens are **equal** before law and are **entitled** to equal **protection** of law.

Equal before law (= identical before law)
Entitled (=warranted)
Equal protection of law (= identical shelter of law)

Thus the Pakistan Constitution of 1973 provides that all citizens are identical before law and are warranted to identical shelter of law.

There shall be no discrimination on the basis of sex alone.

Nothing in this Article shall prevent the state from making any special provision for the protection of woman and children.

" Equality before law" & "Equal Protection of the Laws":
The expression: "equality before law" is a declaration of equality of all persons. Meaning thereby the absence of any privilege in favor of any individual.
Privilege (=advantage)
Every person whatever is his rank or position is subject to the ordinary jurisdiction of the ordinary courts.

Dicey in his **"Law of the Constitution"** explains the concept of legal equality as: "with us every official from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without any legal justification as any other citizen".

The Second expression "equal protection of laws" directs that equal protection shall be secured in the enjoyment of their rights and privileges without favoritism or discrimination. It is said that "equal protection of law" is a pledge of protection or guarantee of equal laws.

It has been clarified that even if there is much in common between the two expressions; they donot mean the same thing. The word " Law" in "Equality before law" is used in a generic sense-a philosophical sense whereas the word "laws" in the " Equal protection of laws" denotes specific laws. Thus the two rules are clearly deducible from the equality before the law provision.

Jennings in his law of the Constitution said that Equality before law means that amongst equals the law should be equal and should be equally administered and that like should be treated alike.

Meaning thereby it forbids discrimination between persons who are substantially in similar circumstances or conditions.

Thus the rule is that like should be treated alike and that unlike should be treated differently.

Classification

The rule that like should be treated alike and that unlike should be treated differently leads to classification between persons made by laws. Persons may be classified in groups and such groups may differently be treated if there is a reasonable basis for such difference.

Reasonableness of classification

A classification to be valid must be reasonable.

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It must always rest upon some real and substantial distinction bearing reasonable and just relation to the needs in respect of which the classification is made.

In order to pass the test of permissible classification following two conditions must be fulfilled:

(1) The classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group.
(2) The differentia must have a rational relation to the object sought to be achieved by the statute in question.

Remedy for the enforcement of fundamental right

Provisions of Articles 199(2) and 184 of the Constitution of 1973 of Pakistan have authorized the superior courts with the power to enforce the fundamental rights in the case of complain about the violation.

An aggrieved citizen on the basis of the rule: ex debito justitiae as a matter of right can claim the redress of his grievance for the enforcement of his fundamental rights and there is little room left in such cases.

The aim of having declaration of fundamental rights in the constitution is that such rights should be regarded as inviolable under the constitution. The fundamental right guaranteed in the constitution are not mere a pious enunciation of the principle on which the constitution is based but are made specifically justiciable under the constitution.

Pertinent here to note that when a citizen complains violation of fundamental rights High Court should exercise its power under article 199 to investigate the matter and pass such order as may be found just, legal and equitable.

Who cannot invoke Article 199 and 184 of the Constitution?

Constitutional jurisdiction of the High Court & Supreme Court cannot be invoked by any one who is guilty of bad faith and of unconscionable conduct.

Duty of High Court in relation to Article 199:

Exercise of jurisdiction under Article 199 is discretionary but High Court must exercise the powers in good faith, justly and fairly having regard to all relevant circumstances.

Abuse of power by executive authority
Where there is clear abuse of power by executive authority and there is denial of fundamental right to the citizens the High Court is under constitutional duty to ensure that people must be dealt in accordance with law.

What is meant by the word: 'Writ'?
Writ means a written order.

Meaning of the word: 'writ' according to Black's Law dictionary Edition 8th.
A court's written order, in the name of a state or other competent legal authority, commanding the addressee to do or refrain from doing some specified act.

In other words it may be said that writ is **remedial right** for the enforcement of **substantive right**.

Remedial right (= the secondary right to have a remedy that arises when a primary right is broken)
Substantive right (=a right that can be protected or enforced by law)

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Through writ the superior courts control executive actions. Whenever executive acts in violation of the law, High Court may grant order which will relieve the aggrieved from the ultra vires act of the executive.

Through writ petition, the High Court exercises its power to provide expeditious and efficacious relief to the writ petitioner.

A petition filed under Article 199 is neither suit nor an application envisaged under Civil Procedure Code; it is a petition under the supreme law of the land i.e., constitution.

To file a writ petition it is necessary that the person aggrieved must has a locus standi.

What is locus standi?

Locus standi is the right to bring an action or to be heard in a given forum.

Power of High Court under Article 199 of the Constitution of Pakistan 1973

Authorities performing judicial , quasi judicial and administrative functions fall under the jurisdiction of High Court. The Article 199 makes no jurisdiction between administrative, judicial or quasi judicial bodies.

Article 199 is wide in scope and has been introduced to correct the actions of Government functionaries which suffer either from lack of jurisdiction or excess of jurisdiction.

Right to file petition under Article 199 has been given to an "aggrieved person"

A writ petition under this Article is not maintainable if the petitioner has come for some indirect purpose.

A petitioner acting malafide is not entitled to relief by the High Court while exercising jurisdiction under Article 199 the court is not to treat the matter as if it were a court of further appeal.

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Lecture 31

Administrative Tribunal

Today the executive Organ of a state performs lot of quasi legislative and quasi judicial functions. Traditional theory that all the judicial functions in a state are performed by the traditional judiciary has become **obsolete**.

Obsolete (= outdated)

In reality many judicial functions are being performed by executive organ of a state e.g., search and seizure, imposition of fine, levy of penalty and confiscation of fine. Due to increase in the role of modern government the old Police state has converted in to welfare state.

These days due to change in theory and practice, the executive organ of a state regulates industrial relations and exercises control over production etc.

Under the overwhelming role of executive in the administration of state, it is not possible for ordinary courts to decide the disputes **expeditiously**. Therefore to decide the issues created under special laws Administrative Tribunals are created to decide the various quasi judicial issues in place of ordinary courts. The tribunals are created under the constitution of Pakistan.

Expeditiously (=fastly)

Relevant Article of Constitution as regard creation of Administrative Tribunal

Under clause (1) of Article 212, the appropriate legislature is empowered to enact laws for the creation of Administrative Tribunal. The tribunals exercise exclusive jurisdiction in the relevant subject matter.

Following are the kinds of Tribunals:

(1) Service Tribunal
(2) Election Tribunal
(3) Inland Revenue Tribunal
(4) Labor Tribunal

Tribunals are those bodies of men appointed to decide controversies arising under certain special law.

What is Special Law?

As per Black's Law dictionary Edition 8th special law is a law that pertains to a person, place, or thing, as oppose to the general public.

What is general law?

Law that is neither local nor confined in application to particular person.

Administrative Tribunal includes a court and often these two terms are used interchangeably.

The functions of the special tribunal is wholly judicial and not administrative.

Some writer says that it is not possible to define the word "Tribunal" ,however, it means seat or a bench upon which a judge or judges sit in a court to dispense justice as regard some special law.

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Tribunals are **clad** in many of the trappings of a court and though they exercise quasi judicial functions, they are not full-fledged court.

Clad (=clothed)

To conclude, it may be said that the tribunal is an adjudicatory body which decides controversies and exercise judicial power as distinguished from pure administrative power and possesses some of the trapping of a court but not all.

Reasons for the Growth of Administrative Tribunals

As per Dicey's theory of 'Rule of Law', the ordinary law of the state must be administered by the ordinary courts, hence, he believes that there is no scope of Administrative Tribunal in a state.

The classical theory of separation of power also states the view of Dicey by saying that in a state it is the duty of ordinary court to dispense justice and there is no scope of "Administrative Tribunal" in a state.

Conversion of police state concept in to welfare state ideology has necessitated the emergence of special laws hence, in a modern state, "Administrative Tribunals are inevitable.

Following are the **cogent** reasons for the growth of "Administrative Tribunals":

Cogent (=logical; convincing)

The traditional courts are insufficient in number and capacity to keep pace with the role of governance in a welfare state.

The traditional courts are slow in process, costly, and more formal in processing the case.

Due to manifold increase in socio economic responsibility of governance, there has emerged many special branches of society and disputes there-under need special courts; ordinary courts lacks expertise in such specialized fields.

Administrative tribunals can avoid technicalities as they take functional view rather than a theoretical and legalistic.

The traditional judiciary is conservative, rigid and technical. They follow strict rules of evidence and procedure whereas the tribunals are not bound to follow strict rules of evidence and procedure and they can take practical view of the matter to decide the issue in contention.

In ordinary court of law the decisions are given after hearing the parties and on the basis of record and evidence. This procedure is not fully followed in administrative tribunals instead wide discretionary power is conferred on them and they mostly follow the formula less of law more of discretion.

Characteristics of Administrative Tribunal

Administrative Tribunal is not an executive body or administrative department of the Government.

Administrative Tribunal cannot delegate its quasi judicial function to any other authority.

It follows rule of natural justice while discharging its judicial functions.

Administrative tribunals are bound to perform their duties judicially.

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Administrative Tribunals records finding of facts, apply legal rules on the hearings.

Administrative tribunal is the creation of a statute and has statutory origin.

As regard procedural matter Administrative tribunal possesses powers of a court e.g., to summon witnesses, to administer oath and to compel production of documents etc.

Administrative Tribunal is not bound to follow strict rule of evidence and procedure.

Administrative Tribunals are independent and are not subject to administrative interference in the discharge of judicial and quasi judicial function.

Against the decisions of Administrative tribunal, writ of certiorari and prohibition are available to an aggrieved person.

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Lecture 32

Administrative Tribunal and Rules of Evidence & Procedure

Administrative tribunal has **inherent power** to regulate its own procedure **subject to statutory requirement**.

Inherent power (=power arising from a status, office or a position)
Subject to (=having regard to)
Statutory requirement (=requirement arising from a statute)

Administrative Tribunal are vested with the power of summoning the witnesses and enforcement of attendance, discovery and inspection, production of documents etc. under the Code of Civil Procedure, 1908.

Proceedings of Administrative Tribunal is deemed judicial proceedings for the purpose of Sections 193, 195 and 228 of the Penal Code 1860 and Sections 480,481 and 482 of the Code of Criminal Procedure 1898.

But as a matter of fact the Tribunals are not bound to follow strict rule of evidence and procedure.

Administrative Tribunals are bound to follow the rule of natural justice and fair play.

What is Rule of Natural Justice?

There are following two principles that are known as rule of natural justice:

(3) **Nemo in propria causa index ess debet** (No one should be made a judge in his own cause)
(4) Audi alteram Partem (no can be condemned unheard)

Rule of Natural Justice is sound product of human civilization.

Rule of Natural Justice is high law of nature.

Rule of Natural Justice is an intelligent common sense of human beings.

In American Jurisprudence it is called "due process of Law.

De Smith states that "the rule of Natural Justice express the close relationship between Common law and moral principles describing what is right what is wrong."

Megory J. states Natural Justice is simple and elementary, as distinct from justice that is complex sophisticated and technical.

Aim of Natural Justice is to prevent miscarriage of justice.

These two basic principles on which the whole superstructure of judicial control of administration are usually not made part of statutory laws.

In a Case Al Hya Noor-ul-Zaman v. AJ & K Zakat Council (NLR 1987 Civil 341, it was held that the principle of Natural Justice shall be presumed to be incorporated in every statute unless its application is excluded by express words in it.

Technical rules of evidence do not apply to the proceedings of Administrative Tribunals; they can rely on hearsay evidence or decide the question on the basis of onus of proof or admissibility of evidence and documents by exercising discretionary power.

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In a case it was held that Tribunals exercising quasi-judicial functions are not Courts; and they are not bound to follow the procedure prescribed for trial of actions in courts nor they are bound by strict rules of evidence. They can, unlike Courts, obtain all information material for the points under enquiry from all sources and through all channels without being fettered by rules and procedure which govern proceedings in Court. The only obligation which the law casts on them is that they should not act on any information which they may receive unless they put it to the party against whom it is to be used and give him a fair opportunity to explain it.

What is fair opportunity?

What is fair opportunity depends on the facts and circumstances of each case but where such an opportunity had been given, the proceedings are not open to attack on the ground that the enquiry was not conducted in accordance with the procedure followed in the Courts.

What is scope of interference of High Court as regard decision given by Tribunal?

A tribunal vested with judicial or quasi judicial power may pronounce an erroneous decision; in this regard the High court may issue writ on the instance of aggrieved party.

But where the decision does not disclose any error on the face of the proceedings, there is absolutely no ground which would justify a superior court in issuing a writ or direction for the removal of the decision of the tribunal.

Every functionary of state derives its power from the Constitution or law and is required to act within the defined parameters of law.

Constitutional schemes leave no room for **arbitrariness**, **capriciousness**, **nepotism** and **jobbery**

Arbitrariness (=unpredictability)
Capriciousness (= untrustworthiness)
Nepotism (=favoritism)
Jobbery (=impersonation)

Thus constitutional schemes leave no room for unpredictability, untrustworthiness, favoritism and impersonation.

Article 199 does not forbid issue of writs against Government but only limit them to particular cases. Even a writ may be issued against administrative order if there is **defiance** from mandatory provision of law.

Defiance (=disobedience)

Judicial Review of Tribunals' Decisions

No appeal, revision, or reference against the decision of Tribunal is maintainable where the said right is not made available by a statute. Provisions may also be provided for ousting jurisdiction of civil court; and in such situations the decision given by a Tribunal will be final and conclusive.

But this statutory finality will not affect the jurisdiction of the High Court under Article 226 & 227 and of the Supreme Court.

The judicial review power of High Court and Supreme Court is recognized by the Constitution of Pakistan 1973. And the same can be taken away by any statute.

Where a tribunal had acted without **jurisdiction** or has failed to exercise jurisdiction vested in it or if the order passed by the Tribunal is **arbitrary**, **perverse** or **malafide** or it has not observed the principle of natural justice

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or there is an apparent error on the face of the order or record or the order is **ultra vires** the Act, or there is no evidence in support of the order or the order is based on irrelevant considerations or where the finding recording are conflicting and inconsistent or **grave** injustice is **perpetuated** by the order passed by the Tribunal or the order is such that no reasonable man would have made it, the same can be **set aside** by the High Court or by the Supreme Court.

Jurisdiction (=allocated field of work)
Arbitrary (=illogical)
Perverse (=bad)
Malafide (= with bad intention)
Ultra vires (= beyond the prescribed limit)
Grave (= serious)
perpetuated (= carried on)

Review is not re-hearing of the matter on merits. A review of a judgment is a serious step and it is done where there is glaring omission or patent mistake or a grave error has erupt by judicial fallibility. A mere repetition through different Counsels and overruled arguments, a second round on ineffectually covered ground or minor mistakes of inconsequential import are insufficient

Suggestion of Franks' Committee on the Improvement of Administrative Tribunal System:

In 1955, a committee under the chairmanship of Sir Oliver Frank was constituted to give recommendation on the constitution and working of Administrative Tribunals. The following were the recommendations:

--Chairman of Tribunal should be appointed and removed by the Lord Chancellor.

--Member should be appointed by the council and removed by the Lord Chancellor.

--Chairman should have legal qualifications and always in the case of Appellate Tribunal.

--Remuneration for service on Tribunal should be reviewed by the Council of Tribunals

--Procedure for each Tribunal based on Common principles but suited to its needs should be formulated by the Council.

--The Citizen should be helped to know in good time the case he will have to meet.

---Hearing should be in public except only in cases involving (i) public security (ii) intimate personal or financial circumstances (iii) professional reputation, where there is a preliminary investigation.

--Legal representation should always be allowed save only in most exceptional circumstances.

--Tribunals should have power to take evidence on oath, to subpoena witnesses and to award costs. parties should be free to question witness directly.

--Decisions should be reasoned, as full as possible, and made available to the parties in writing.

--Final Appellate Tribunal should publish and circulate selected decisions.

There should be right of appeal on a point of law and merits to an Appellate Tribunal, except where the lower Tribunal is exceptionally strong.

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Administrative Tribunal Distinguished from Court

Administrative tribunal and court has certain similarities; both are constituted by state;

The both are vested with judicial powers; their duty is to dispense justice to masses; they are of permanent stature and existence.

They are permanent adjudicating bodies.

It was held in a case that the basic and fundamental feature common in both is that they discharge judicial functions and exercise judicial powers vested in a sovereign state.

But, besides the above, it is a core fact that an "Administrative Tribunal" is not a full-fledged court but possess some of the trappings of a court.

Following are the points of distinction between the two:

(1) A court is part of the traditional system of court; it derives judicial power from a sovereign state, whereas Administrative Tribunal is an agency created by statute vested with judicial powers. Administrative tribunal is part and parcel of executive branch of a state. In this regard **Lord Green** said Administrative Tribunal performs hybrid form of functions.
(2) Judges of the traditional court are independent from the executive organ of a state in respect of their terms and condition of services etc. whereas the matter is otherwise in relation to the judges of Administrative Tribunal.
(3) A court of law is presided over by a judge well learned in law, whereas, the matter may be otherwise in case of Administrative Tribunal.
(4) In a court of law a judge may be an impartial arbiter and he cannot decide the matter in which he is interested but in the case of judge of Administrative Tribunal, the matter is otherwise.
(5) A court of law is bound by all the rules of evidence and procedure but Administrative Tribunal is not bound by all these unless made obligatory by the statute.

Whether Administrative Tribunal, while proceeding quasi judicially, follows principle of Natural Justice?

Administrative Tribunal does not perform purely administrative function; it performs judicial and quasi judicial functions. The tribunal decides disputes independently, judicially and objectively without any bias or prejudice.

The Frank Committee, in its report, declared following three fundamental objectives of Administrative Tribunal:

(1) Openness
(2) Fairness
(3) Impartiality

The Law Commission in its fourteenth Report observed that Administrative Tribunal performs quasi judicial functions and they must act judicially in accordance with the rule of natural justice.

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What is rule of natural justice?

There are following two principles that are known as rule of natural justice:

(1)Nemo in propria causa index ess debet (No one should be made a judge in his own cause)
(2)Audi alteram Partem (no can be condemned unheard)

Rule of Natural Justice is sound product of human civilization.

Rule of Natural Justice is high law of nature.

Rule of Natural Justice is an intelligent common sense of human beings.

In American Jurisprudence it is called "due process of Law

However due to rapid growth of 'Administrative Law' & 'Constitutional Law' a third principle of Natural Justice has been evolved which is:

(3)Speaking order or reasoned decision

Speaking order means an order speaking for itself. In other words every order must contain reason in its support. According to this principle the party effected must know why and on what grounds the order was passed against him.

As to why reasons for a decisions are required to be disclosed?

There are three reasons:

(3) Aggrieved party has right to appeal to appellate court on the ground that the decision of the authority is based on erroneous reasons.
(4) Obligation to record reason is a deterrent against arbitrary action taken by executive authority invested with judicial power.

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Lecture 33

Judicial & Alternative Remedies against Administrative Action

Administrative Law entertains the idea that there must be some outside strong enough control over the administrative action to prevent injustice to the individual while giving the administration adequate freedom to carry on the business of government effectively.

Today the government functions have been increased manifold in every walk of life, in this regard **Lord Denning** says that "proper exercising the new executive powers lead to a **welfare state** but where they are **abused** lead to a **totalitarian state**.

Welfare state (= state concerned with the well being of its citizens)
Abused (=ill-treated)
Totalitarian state (= tyrannical state)

As a matter of fact without effective control on executive individual will be without remedy and it is against the fundamental concept: ubi jus ibi remedium (where there is a right there is a remedy)

It is said that right and remedy are two sides of coin and they cannot be disassociated from each other.

The important judicial remedy available to an aggrieved against administrative action is prerogative remedy.

Remedy (= the means of enforcing a right or redressing a wrong)

Prerogative writs are writs which originally were issued only at suit of the King but which were made available to the subject. They were called "prerogative" because they were conceived as being intimately connected with the rights of the Crown.

Historical back ground and purpose of prerogative writs

In England, the prerogative writs played vital role in maintaining and upholding the rights and liberties of common men and in providing effective safeguards against the arbitrary actions of public authorities.

As per the Constitution of Pakistan 1973 the judicial review is the integral part of our constitutional system and without it there will be no government according to rule of law. Judicial review is basic and fundamental for the maintenance of democratic state, judicial review is the unquestionable part of our judicial and constitutional system.

Jurisdiction of High Court as regard "Judicial Review"

Article 199 of the Constitution of Pakistan 1973 confers powers on High Court to make orders on the writ petition of an aggrieved party. The Article intends to enable the High Court to control executive so as to bring it in conformity with the law. Whenever executive acts in violation of the law, an appropriate order may be granted by court to make the citizen relieved from the illegal act of executive.

Meaning of the term: "Writ" as per Black's Law dictionary:

A court's written order in the name of a state or other competent legal authority **commanding** the **addressee** to do or refrain from doing some specified act.

Commanding (= giving order)
Addressee (= receiver)

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The powers and **jurisdiction** of the High Court **conferred** by Article 199 cannot be restricted through any law which is not the part and parcel of the constitution.

Jurisdiction (= field of work)
Confer (= bestow)

High Court & Supreme Court can issue writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari.

Jurisdiction of High Court under this Article is meant to provide expeditious and efficacious remedy in a case where illegality, impropriety, and flagrant violation of law regarding impugned action is apparent and can be established without any comprehensive inquiry in to complicated, ticklish, controversial and disputed facts.

Article 199 casts an obligation on the High Court to act in aid of law, protect the rights of the citizens within the frame work of the constitution against the infringement of law and the Constitution by the executive authorities, strike a rational compromise and a fair balance between the rights of citizens and the actions of the state functionaries claimed to be in the larger interest of society. The Article is intended to enable the High Court to control executive action so as to bring it in conformity with the law.

Who has Locus Standi to file writ before High Court:

The issue as to who may file a petition is a fundamental question and has given rise to much debate and controversy, and yet its importance cannot be ignored or underestimated because the court may not entertain such a petition if not presented by an aggrieved or interested person.

It is an established rule that if the petitioner has no locus standi to file the petition, he cannot be heard on merits.

What is locus standi ?

According to Black's law dictionary it means right to bring an action or to be heard in a given situation.

In a case petitioner was a candidate who submitted application following the advertisement published by the department for a vacancy of a driver. It was held by court of law that no law conferred a right to the petitioner to be appointed by the authorities but the petitioner had right to demand that the authorities should determine his application in accordance with law. It was held that the petition was maintainable.

In an other case it was held by the High Court that every citizen and member of public, whether he is personally aggrieved or not has the duty to highlight and raise voice qua illegal and unconditional acts of Provincial Government.

Against whom writ may be issued?

While deciding whether a writ would lie in given circumstances, the first inquiry to be made is against whom a writ can be issued.

Ordinarily a writ lie against a state and the statutory bodies and persons charged with public duties. Though private persons are not immune from the writ jurisdiction of Supreme Court and High Court but issuance of the writ to them require exceptional circumstances.

As a general rule a writ lies against a state and as per, the following, Article 12 of the constitution 1973 state includes:

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"In this part unless the context otherwise requires, the State includes the Government and Parliament of the country and the Government and the Legislature of each of the Provinces and all local or another authorities within the territory of the Country or under the control of the Government.

Meaning thereby a writ may be issued against the following:

(1) The Government and Parliament of the Country.
(2) The Government and the Legislature of each of the provinces.
(3) All local or other authorities within the territory.
(4) All local or other authorities under the control of the Government.

Delay and laches.

Under Article 226, the power of High Court to issue a writ is **discretionary**. The relief cannot be claimed as of right, however where the relief claimed is one relating to enforcement of fundamental right, the court must grant it.

Discretionary (=optional)

One of the grounds for refusing relief is that the petitioner is guilty of delay and laches. If the petitioner intends to take relief, it is imperative that he would come to the court as the earliest **reasonable** opportunity.

Reasonable (=logical; sensible)

Inordinate delays in filing the writ will be a sufficient ground for refusing to exercise the discretion.

Inordinate (=undue; excessive)

It is essential that person aggrieved of an action of government or any executive action should come to High Court with utmost **expedition**.

Expedition (=mission)

In an appropriate case the high Court may not exercise its discretion and may refuse to grant relief if there is such negligence or omission on the part of the applicant to assert his right as taken in conjunction with the laps of time and other circumstances.

As a general rule, the Superior Courts are **averse** to granting relief in the exercise of their extra ordinary power of judicial review to parties who are guilty of laches or delays in invoking the jurisdiction. The reason being that by their omission, to act promptly such parties may be deemed to have accepted the orders of the administrative authorities and it would be unfair to disturb at their instance, rights and obligations which had been settled and finalized long ago under the relevant law.

Averse (=reluctant)

Difficulty arise as to measures of delay since the Limitation Act 1908 does not apply to writ petitions and no period of limitation is prescribed by the Constitution of Pakistan 1973 to move the Supreme Court And High Court; the matter is more or less left to judicial discretion.

In a case it was held that no hard and fast rule can be laid down as to when the High Court should refuse to exercise its jurisdiction in favor of a party who moves it after considerable delay, and is otherwise guilty of laches. That is a matter which must be left to the discretion of the High Court and like all matters left to the discretion of the Court in this matter too discretion must be exercised judiciously and reasonably.

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Alternative remedy

Article 32 confers powers on Supreme Court to issue certain writs, directions and orders for the enforcement of fundamental rights conferred by the Constitution.

The Constitution of Pakistan 1973 empowers High Court to issue such writs, directions or orders for enforcement of fundamental rights or "for any other purpose". It is well established that the remedy provided for in the Constitution is a discretionary remedy and the High Court has always the discretion to refuse to grant such a relief in certain circumstances even though a legal right might have been infringed. Availability of an alternative remedy is one of such considerations which the court may take in to account to refuse to exercise its jurisdiction.

The writ of mandamus, certiorari and prohibition, and for that matter, all high prerogative writs are not issued where there exists an alternative remedy equally efficient and adequate.

Whether the alternative remedy is equally efficacious or adequate is a question of fact to be decided in each case.

When there is violation of fundamental rights of the petitioner, the Supreme Court as well as High Court have to exercise their extra ordinary jurisdiction to issue appropriate writs

When question raised in the petition is constitutional or of public importance and the general public is interested it is desire-able for the High Court to entertain the petition.

When once a High Court entertains a petition under the Constitution, it would not be proper to dismiss it only on the ground that an alternative remedy is available to the applicant.

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Lecture 34

Kinds of Writ

Meaning of the writ of Quo Warranto as per Black's Law Dictionary Edition 9th:

Law Latin "by what authority". It is a common law writ used to inquire in to the authority by which a public office is held.

Writ of Quo Warranto is an action by which the state seeks to revoke a corporation's charter.

Writ of Quo Warranto is a remedy whereby the Court enquires in to the legality of the claim which a party assumes to an office and to oust him from that office if the claim is not well founded or to have it declared forfeited and to recover it.

High Court in exercising its constitutional jurisdiction is competent to enquire from a person holding the public office as to under what authority of law he claims to hold the office.

The writ of Quo Warranto was in its nature an information, lying against a person who claimed and usurped an office, franchise or liberty and was intended to enquire by what authority he supported his claim in order that the right to the office or franchise or liberty may be determined. It is necessary for the issue of writ that the office should be one created by the state, by charter or by statute and that the duty attaching to the office should be of a public nature. It is also necessary that the respondent should be in possession and user of the particular office in question. The office must be substantive in character, that is, an office independent in title and not being terminable at pleasure.

Under Article 199 of the Constitution of Pakistan 1973, the High Court in exercise of its constitutional jurisdiction is competent to inquire any person holding public office as to show under what authority he is holding the office. Under such situation it is the duty of the petitioner to provide information before the court that such officer has no legal authority to retain the office. For a petitioner who acts as an informer is not required to establish his locus standi to invoke the jurisdiction of the Court. The writ can be moved by a person who even is not an aggrieved party. Meaning thereby any person can move the High Court to challenge the unauthorized occupation of a public office.

Relief in Writ of Quo Warranto is confined to:-

(i) issuing an injunction to a person holding the office not to act therein.
(ii) where necessary to declare the office to be vacant.

Writ of Habeas Corpus

Meaning of the Writ of Habeas Corpus as per Black's Law dictionary Edition 9th:

Law Latin "that you have the body". It is a writ employed to bring a person before a court, most frequently to ensure that the person's imprisonment or detention is not illegal.

Generally the writ of habeas corpus is issued in case of illegal and improper detention in public or private custody. Writ is applicable as a remedy in all cases of wrongful deprivation of personal liberty.

In other sense it may be said that the writ is issued to test the validity of any detention whether by the executive or by a private individual or by any other authority exercising judicial or quasi judicial powers.

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The writ of Habeas Corpus may be used to obtain judicial review of the:

(i) regularity of the extradition process;
(ii) right to bail etc.
(iii) jurisdiction of a court that has imposed a criminal sentence

Halsbury in his Laws of England 4th Edition states:

The writ of Habeas Corpus is a prerogative process for securing the liberty of the subject by affording an effective means of immediate release from the unlawful or unjustifiable detention whether in prison or in private custody. It is a prerogative writ by which the Queen has a right to inquire in to the laws for which any of her subjects are deprived of their liberty".

The writ of Habeas Corpus is also known as "**the Great Writ of Liberty**".

Kinds of Habeas Corpus Wirt:

Following are the kinds of Writ of Habeas Corpus:

(1) Habeas Corpus ad subjiciendum: it means that you have the body for submitting to and receiving.
(2) Habesa Corpus ad testificundum: the object of this writ is to bring a legally detained person before the court for purpose of giving evidence.
(3) Habeas Corpus ad deliberandum and recepiendum: the object of this writ is to remove a prisoner from one's custody to another for the purpose of his trial in the proper jurisdiction.
(4) Habeas Corpus ad respondendum: the object of this writ is to bring a prisoner detained under civil or criminal processes, before a magistrate or court for trial or examination on any charge other than for which he has been imprisoned.

Writ of Certiorari

Law Latin word which means "to be more fully informed". It is an extra ordinary writ issued by an appellate Court, at its discretion, directing a lower court to deliver the record in the case for review

Halsbury states:

"The order of certiorari issues out of High Court, and is directed to the judge or officer of an inferior tribunal to bring proceeding in a cause or matter pending before the tribunal in to the High Court to be dealt with in order to ensure that the applicant for the order may have the more sure and speedy justice. It may be had in either civil or criminal proceedings. The first example of issue of writ of Certiorari is found in a letter written in 1252, from Henry III to the Mayor of Bordeaux, expressing readiness to be informed of the grievances of his subject in that city.

As observed by **Mr. Justice Secrutoon** "the writ of Certiorari is a very old and high prerogative writ drawn up for the purpose of enabling the court of King's Bench to control the action of inferior courts and to make it certain that they shall not exceed their jurisdiction.

The Court issuing a Writ of Certiorari acts in exercise of a supervisory jurisdiction not appellate jurisdiction. As regard the character and scope certiorari will be issued for correcting error of jurisdiction:-

(1) When an inferior court or tribunal acts without jurisdiction or in excess of it or fails to exercise it.
(2) When the court or Tribunal acts illegally in the exercise of its undoubted jurisdiction as when it decides without giving an opportunity to the parties to be heard, or violates the principle of natural justice;
(3) If there is an error apparent on the face of the record.

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A writ of certiorari is undoubtedly available to correct errors in the exercise of quasi judicial appellate powers. High Court can issue a Writ of Certiorari to inspect the proceedings of a subordinate Court to determine whether there has been any irregularity.

A person invoking discretionary power of court is bound to show that some injustice has been done to parties.

Writ of Prohibition

Meaning of "Writ of Prohibition" as per Black's Law Dictionary Edition 9th :

"An extra ordinary writ issued by an appellate court to prevent a lower court from exceeding its jurisdiction or to prevent a non judicial officer or entity from exercising a power".

Prohibition is an original remedial writ, as old as Common Law itself. The writ is so ancient that forms have been given in **Glanvile**, the first book of English Law, written in 1189.

Prohibition is the converse of a "Writ of Mandamus" in the mandatory form as the Writ of Prohibition is issued to prevent a court from doing something which it has no power to do. A "Writ of Prohibition" is an order directing an inferior tribunal to refrain from continuing with a proceeding therein on the ground that the proceeding is without or in excess of jurisdiction or contrary to the laws of the lands and the proceeding may be without jurisdiction if it contravenes some enactment or some principles of Common Law.

Grounds on which "Writ of Prohibition" may be issued:

Want of Jurisdiction: the "Writ of Prohibition" lies only when it is intended to restrain a court or tribunal from assuming a jurisdiction which it does not possess. The writ as a matter of fact lies not only for excess of jurisdiction but also for the contravention of some statute or principles of Common Law. A statutory functionary acting malafide or in a partial and unjust or apprehensive manner is **amenable** to the writ jurisdiction of the High Court. A "Writ of Prohibition" is justified only where there is an unlawful assumption of jurisdiction as distinguished from an **erroneous** and improper exercise of it.

Amenable (= open to)

Erroneous (=incorrect; invalid)

Violation of Principle of Natural Justice:

A "Writ of Prohibition" may be issued when it is found that the action was in violation of principles of natural justice. The procedure adopted without issuing a show cause notice was held to be against all principles and canons of justice, fair play and equity.

According to the Constitution of Pakistan 1973 a "Writ of Prohibition" may be issued against any person performing within the territorial jurisdiction of the court, functions in connection with the affairs of the Federation or Province or a local authority.

Meaning of the term: "Writ of Mandamus" as per Black's Law Dictionary edition 9th :

Latin "**We Command"**. The writ is issued by a Court to compel performance of a particular act by a lower court or a government officer or a body to correct a prior action or failure to do some act.

"Writ of Mandamus" is a command issued by the High Court directing any person to do any particular act therein specified which **appertains** to his office and is in the nature of a public duty.

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Appertains (= relates)

A "Writ of Mandamus" cannot be issued without a right, absence of a clear right in writ petitioner would **denude** him to **invoke** the writ jurisdiction.

Denude (=uncover)
Invoke (=bring in to play)

Writ of Mandamus is not issued against Government in discretionary matters. Writs or prohibition and writ of certiorari can be issued.

It is a well settled principle of law that a proceeding in the writ jurisdiction is more in the nature of a "Summary Proceedings" in which examination of disputed **questions of fact** is taken.

Question of fact (=anything, state of things or relation of things capable of being perceived by senses or any mental condition of which any person is conscious)

High Court on application of any aggrieved party has power to make an order directing a person performing within territorial jurisdiction of High Court functions in connection with affairs of Federation, Province or a Local authority to refrain from doing anything he was no permitted by law to do or to do anything he is required by law to do or make an order giving such directions to any person or authority exercising any power or performing any function in relation to any territory within the jurisdiction of that High Court as could be appropriate for enforcement of any fundamental rights conferred by the Constitution of Pakistan.

Mr, Justice Cornelius' Observation on the "Writ of Mandamus":

The writ of mandamus is a direction issued to any natural person, corporation or inferior court within the jurisdiction requiring them to do some specific thing therein and which appertains to their office or duty.

Power of High Court under Article 199 of the Constitution of Pakistan 1973

Authorities performing judicial, quasi judicial and administrative functions fall under the jurisdiction of High Court. The Article 199 makes no jurisdiction between administrative, judicial or quasi judicial bodies.

Article 199 is wide in scope and has been introduced to correct the actions of Government functionaries which suffer either from lack of jurisdiction or excess of jurisdiction.

Right to file petition under Article 199 has been given to an "aggrieved person".

A writ petition under this Article is not maintainable if the petitioner has come for some indirect purpose.

A petitioner acting malafide is not entitled to relief by the High Court.

While exercising jurisdiction under Article 199, the court is not to treat the matter as if it were a court of further appeal

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Lecture 35

Judicial Review

Judicial Review of Administrative Action

"Judicial Review acts as a check against excess of power in **derogation** of private right"

Derogation (= disrespect)

The functionaries of state derive their powers from the constitution or laws; they are required to act clearly within the defined parameters of law; exercising of governmental power is a sacred trust and they are required to perform their duties as trustees. They are required to act **reasonably**, **impartially**, without **arbitrariness** and within the defined **sphere** of their power.

Reasonably (=logically; sensibly)

Impartially (=neutrally)

Arbitrariness (=randomness)

Sphere (=area; field)

The development of administrative process poses many serious problems; it affects the relationship between public power and personal rights. It magnifies the problem of reconciling freedom and justice for the private citizen with the necessities of a modern government demands regarding the promotion of far reaching social or economic policies. The extended powers and functions of the modern state hold potential threats to justice and freedom.

Properly exercised the new powers of the executive lead to the welfare state but abused they lead to totalitarian state.

It has been established through experience that if the administrative authorities are allowed to function unfettered of judicial control, then exercise of authority is likely to become colorable through arbitrariness, capriciousness, political influence, policy consideration and such other expediencies. This is the historical rationale for the introduction of judicial review of the administrative actions of authorities.

In strict sense judicial review means that the Superior Courts can strike down a law on the touchstone of the Constitution. Moreover it is inherent in the nature of Judicial Review that the Constitution is regarded as the supreme law and any law or Act contrary to it of infringing its provisions is to be struck down by the court.

Practice and Concept of Judicial Review of Administrative Action in Britain, USA & Pakistan.

In Britain Administrative Law was not being studied as separate branch of law due to the influence of A.V Dicey. The idea of administrative adjudicatory authority entrusted with the power to determine private rights was **anathema** to English Lawyers. Administrative Law was thought to be inconsistent with the maintenance of the rule of law.

Anathema (=abhorrence)

But today the study of Administrative Law in Britain has recovered fully from Dicey's denial of its existence. The post war period in Britain was a steady rise in the number of Tribunals to deal with the problems following

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the war. Attempts have been made to regulate the working of such tribunals by the creation of the office of Parliamentary Commissioner under the Parliamentary Commissioner Act 1967.

Creation of Administrative bodies was also faced with initial resistance in the USA from the legal profession and the influential writers. But the growth of administrative agencies have been accepted as inevitable. It was recognized that in a government of limited powers, these agencies of regulations must themselves be regulated. Judicial review has been found as an effective manner of regulating administrative agencies.

The controversies about the powers of the administrative agencies and the scope of judicial review have clarified the issues and paved the way for a reasonable amount of judicial control over the agency actions.

In Pakistan, the development of judicial review of administrative action has followed the pattern of Britain and USA. There has been marked no any opposition to the administrative process but it has been accepted as an inevitable consequence of national planning and growth of the welfare state. Judicial review of the administrative action is commonly exercised through writ jurisdiction of the superior courts.

Duty of Court & Judicial Review

The duty of court in exercising the power of judicial review is to confine itself to the following questions:

(1) Whether a decision making authority exceeded its powers?

(2) Whether the authority has committed an error of law?

(3) Whether the authority has committed a breach of the principle of natural justice?

(4) Whether the authority has reached a decision which no reasonable person would have reached?

(5) Whether the authority has abused its power?

It is to be noted that the power of judicial review is not directed against the decision but is confined to the decision making process.

Therefore courts generally do not appreciate evidences or enter in to determination of question which demand elaborate examination of evidence or inference in the punishment imposed unless the administrative action is malafide.

Purpose & object of Judicial review

Purpose and object of judicial review is to keep various functionaries of State within the ambit of their authority.

Firstly Superior Courts check the functioning of the legislature i.e. whether laws made by it are in conformity with the constitution.

Secondly, it checks the quasi legislative and quasi judicial functions of the administration.

Delegated legislation i.e. rules, regulations, bye laws etc. made by the administration can be judicially reviewed by Superior courts to determine whether powers conferred on administration by the legislature has been properly exercised.

Similarly propriety of quasi judicial action can also be subject to judicial review. Where any law made by the legislature is found in conflict with any provision of the constitution or where any rule, regulation or bye law

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made or action taken by the administrative authorities are found to be voilative of any provision of the constitution or any other law or any other law, the same is declared as ultra vires and invalid.

Though some discretion is necessary to keep the giant wheels of administration moving in this age of an intensive form of government, if the power is misused, the arms of the court are long enough to reach to pull the administration and compel it to obey the mandates of the constitution.

Ground of Judicial Review

Following are the grounds of judicial review:

(1) Proportionality
(2) Unreasonableness
(3) Procedural impropriety
(4) Illegality
(5) Irrationality

Proportionality

Proportionality means that action should not be more drastic than it ought to be for obtaining the desired results. It covers some common ground with reasonableness. Proportionality is a course of action which could have been reasonably followed and should not be excessive or severe etc. legal principle of proportionality acts in favor of reliability and predictability. This means that administrative action should be proportionate to the end pursued by the law.

Unreasonableness

Unreasonableness means that either the facts do not warrant the conclusion reached by the authority or the decision is partial and unequal in its operation. Unreasonableness of an action as a ground cannot be passed in the sense that it is not reasonable but in the sense that it is discriminative or partial or operate unequally between different classes or manifestly unjust or malafide or oppressive or gross interference with the rights of the people that no justification can be found in the mind of reasonable man.

Procedural impropriety

This means that the procedure for taking administrative decision and action must be fair, reasonable and just. When a legislative, quasi legislative, judicial or quasi judicial action is called in question before any superior Court for judicial review, the court is quiet competent to examine whether such actions suffer from any procedural infirmity of such a grave nature that it goes to the very root of validity of such action, such actions are always liable to judicial review.

Illegality

Illegality as ground for judicial review means that the decision making must understand correctly the law that regulates his decision making power and must give effect to it.

Irrationality

Irrational decision is the decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be declared could have arrived.

Powers and jurisdiction of Courts

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Judicial Review is an essential feature and signature tune of our constitution. Administrative actions are subject to judicial control. Legislative power to make law is confined within the limit prescribed by the constitution.

No law can be made which is in conflict with any constitutional provision or which may violate or take away or even abridge the Fundamental Rights that have been guaranteed in Part II of the Constitution of Pakistan 1973.

If the legislative or executive authorities trespass in the sphere of Fundamental Rights or transgress beyond the limits prescribed by the Constitution, any law made or action taken can be struck down as usurpation and unconstitutional exercise of powers.

High Court under Article 199 and Supreme Court of Pakistan under Article 184 of the Pakistan Constitution have vast powers to entertain and adjudicate constitutional petitions. Such jurisdiction of the Superior court is known as Constitutional Jurisdiction.

In ancient English Judicial system this system was known as writ jurisdiction which empowered the court of King's Bench to issue writs in the name of the sovereign.

Pakistan has hierarchical judicial system in which Supreme Court of Pakistan is the Apex Court. It is the final interpret of law and the ultimate court of appeal in all civil, criminal and constitutional matter. It is also the protector of people's Fundamental Rights.

Judicial review is not only an integral part of the Constitution of Pakistan but is also a basic structure of the Constitution which cannot be abolished.

In any democratic society, judicial review is the soul of the system because without it democracy and the rule of law cannot be maintained.

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Lecture 36

Ombudsman

Meaning of the word: "Ombudsman" as per Black's Law Dictionary:

"An official or semi official office or person to which people may come with grievances connected with government. The Ombudsman stands between and represents the citizen before the government".

Meanings of the word: "Ombudsman" as per Thomas Patric :

Muhtasab is the public censor of religion and morals who is appointed by a Muslim ruler to punish Muslim for neglecting the rules of their religion.

Meanings according to Encyclopedia Islam:

The word: 'Ihtesab', on the one hand, means: "it is the duty of every Muslim to promote good and forbid evil". And on the other hand means: "the function of the person who is effectively entrusted in a town with the application of this rule in the supervision of moral behavior and more particularly of the markets"; the person entrusted with the ihtesab is called "Muhtasib".

Meaning of the word: "Muhtasib" according to Advanced Learners Dictionary:

"A government official who examines and reports on complaints made by ordinary people about the government or public authorities.

Role of Ombudsman defined by Sir Edmund Compton:
Ombudsman function is to investigate the action taken by a department and decide whether there has been maladministration by the department or not. Primarily Ombudsman is investigator.

Meaning of the word: Ombudsman as per Encyclopedia Americana:
Ombudsman, an independent public officer, appointed to receive complaints from citizens about abuses, unreasonable acts, or delays by government agencies. He investigates and reports his findings and recommends solutions.

In Islam the theoretical foundation of Muhtasib lie in the following Quranic verses:

Let there arise out of you a band of people inviting to all that is good, enjoining what is right and forbidding what is wrong. They are the ones to attain felicity.
(Al-Quran (3:104)

Salient features of Ombudsman system

For a perfect Ombudsman system, following are the glaring features:

(1) The Ombudsman exercises surprising amount of independence even from the legislature. Meaning thereby independence is fundamental to ombudsman system.
(2) The ombudsman receives complaint about government action or inaction from the public or he sets on at his own initiatives.
(3) The ombudsman system involves speedy inexpensive and formal procedure.

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(4) Ombudsman generally conducts an impartial investigation; he calls upon all persons for information, requires the production of documents and gets access to government record subject to specific limitations.
(5) He has no right to quash or reverse a decision or order of any official and can only make a report, recommendation or suggestion even in Sweden and Finland. His most potent weapon is an expression of his opinion.
(6) Ombudsman is easily accessible.
(7) He gives reasons for the dismissal of a complaint.
(8) An advocate is not required once a complaint is filed, the Ombudsman himself becomes the moving party.
(9) Ombudsman many suggest changes or improvements in administrative procedure or change in legislation.
(10) The Ombudsman publicizes his opinions and issue reports.

First Ombudsman of the world & the office of Ombudsman in different countries:

Prophet Muhammad (Peace be upon him) was the first Ombudsman of the world who introduced the institution of Muhtasib and provided justice to the down trodden people of Arabia. He (peace be upon him) kindled the light of justice in the other corners of the globe.

The institution of Muhtasib is one of the most distinctive features of socio administrative history of Islam. The institution ceased to exist by the end of the 19th century as an office of public conscience and morality, nevertheless, it left behind the trail of golden traditions.

The office of Swedish Ombudsman is the long established and the most powerful of all contemporary ombudsman offices. The Public Administration books reveal that the office was the outcome of historical event occurred in the era of King Charles when there was a rebellion against him and the King sought refuge in Turkey where he observed the working of Dewan-e-Mazalim. The King learnt the concept and established the institution of Ombudsman in Sweden in 1713.

Denmark has office of Ombudsman since 1966 when the new constitution was being planned for the country after the First World War. The committee on the constitution proposed that Parliament should elect one or two persons from outside the Parliament whose function would be to supervise the administrative system and the armed forces.

The committee gave its opinion that such increased guarantees could be through the office of Ombudsman similar to the Swedish prototype.

Following Swedish example, the institution of parliamentary ombudsman was included in the Constitution Act of 1919. Credit goes to Finland for having adopted the institution of Ombudsman long before the idea became popular in the rest of the democratic world.

Newzealand established the institution of Ombudsman by enacting "Parliament Commissioner (Ombudsman) Act 1962". The Commissioner was appointed by the Governor General.

In the late fifties and in the beginning of the sixties in U.K., the view gained ground that there was a need for a citizen's grievance against administration. The emerging belief that the minister's own accountability to Parliament was no longer sufficient to protect the victim of the departmental error and mal-administration led to the establishment of the office of Parliamentary Commissioner in 1967.

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Ombudsman system in Pakistan

In Pakistan, the establishment of an Ombudsman institution had been advocated for some time before Article 276 of the interim Constitution of 1972 provided for the appointment of a Federal Ombudsman & Provincial Ombudsman. In Urdu we call this institution as "Wafaqi Mohtasib" or "Sobaei Mohtasib".

The Constitution of Pakistan 1973 also provided for a Federal Ombudsman and the institution was eventually created through the establishment of the office of Wafaqi Mohtasib Order 1983 which is now part of the Constitution of Pakistan 1973 by virtue of Article 270-A.

The Ombudsman has Head Quarter in Islamabad and Regional offices in Lahore, Sukkur, Quetta, Faisalabad, Multan, Dera Ismail Khan, Peshawar and Karachi.

Other Ombudsman agencies in Pakistan include Provincial Ombudsman offices in Punjab, Balochistan, and Sindh.

There are also Banking Ombudsman, Federal Insurance Ombudsman and a Federal Tax Ombudsman. The disputed region of Azad Jammu Kashmir also has an Ombudsman Office.

Under the Protection of Woman at Work Place Act 2010, Musarat Hilali was appointed in the same year to be the first Ombudsman for the protection of women against harassment at work place. The Act provides for similar offices at the Provincial level.

The various Ombudsman agencies participates in a forum of Pakistan Ombudsman and the Federal bodies are affiliated to the Asian Ombudsman Association and the International Ombudsman Institute.

Mal-administration, a persistent evil of executive organ of a state

Dictionary meaning of the term maladministration is 'faulty administration'.

Sir. K.C Wherae asserts that mal-administration is a very large subject, it occurs wherever social organization exists, it is not confined to the operation of the government or the state alone. He further maintains that there is great deal of administration of government officials going on and it is certain that there will be a great deal more. It is not **eccentric** to conclude that if there is more administration, there will be more mal-administration.

Eccentric (=strange)

Nobody can define mal-administration in plain terms said Sir Edmund Compton, the first British Parliamentary Commissioner for Administration.

Maladministration can be divided in to three parts: firstly mal-administration connected with the executive actions of government; secondly, mal-administration is connected with the discretionary decisions of government and thirdly, mal-administration arising out of faulty laws.

Maladministration in different departments of government takes place in the following form:

(1) Abuse of powers
(2) Biased attitude
(3) Misconduct
(4) Undue delays in proceedings
(5) Inability of the staff in comprehending the relevant laws
(6) Negligent behavior
(7) Adoption of defective procedure

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(8) Wrong adjudication by the department &
(9) Arbitrary decisions.

Powers of Mohtasib

If the Mohtasib finds an element of mal-administration in a matter, he can, after investigating the matter, ask the agency concerned to consider the matter further, to modify or cancel its decision, to take disciplinary action against any public servant, to dispose of the case within a specified time, or to improve the working of the agency, or to take any other specified steps.

Failure on the part of an agency to comply with the Ombudsman's recommendation is treated as "Defiance of Recommendations" which may lead to reference of the matter to the President of Pakistan who in his discretion may direct the Agency to implement the recommendations.

The Mohtasib is empowered to award compensation to an aggrieved person for any loss or damage suffered by that person on account of maladministration.

But if the complaint is found to be false, or frivolous, he can also award compensation to the agency or the functionary against whom the complaint was made.

The Mohtasib has the same powers as a civil court under the Civil Procedure Code for production of documents and receiving evidence on affidavits.

He has also powers identical to that of the Supreme Court of Pakistan to punish any person for contempt.

From the complaints against Federal agencies 50 percent were admitted for thorough investigation and remaining were not entertained due to the reason that either they were subjudice service matter or no mal-administration was found apparently.

During the year 1993, the highest number of complaints i.e. 20934 out of 44,578 complaints after scrutiny, were admitted for investigation and 79 percent of them were disposed off resulting in relief to the aggrieved.

Since its establishment, the most significant impact of this institution is that it has revived the concept of administrative accountability in Pakistan which is both an Islamic **tenet** and a democratic obligation.

Tenet (=principle)

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Lecture 37

Definitions of Administrative Law

It is impossible to give a precise definition of Administrative Law; nevertheless the following definitions of Administrative Law are discussed:

Definition of Administrative Law by Sir Ivor Jennings:

"Administrative Law is the law relating to the administration".

What is Administration?

It is the management of the executive duties of government institutions.
Thus it may be said that "Administrative Law" is the law relating to the management of the executive duties of a government institutions.

Definition of Administrative Law by K.C Davis:

Administrative Law is the law concerning the powers and procedures of administrative agencies, including especially the law governing judicial review of administrative action.

What is meant by administrative agencies?

It means a governmental body with the authority to implement and administer particular legislation for example Police, F.I.A. & FBR etc.

What is Judicial Review?

It is a court's power to review the actions of other branches of government i.e. legislature and executive.

Thus it may be said that 'Administrative Law' is the 'law' concerning the powers and procedures of governmental bodies with the authority to implement and administer particular legislation for example F.I.A and Police etc. including especially the law governing court's power to review the action of other branches of government i.e. legislature and executive.

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Lecture 38

Administrative Justice

To become a welfare state, the state has assumed more and more powers and functions.

A state consists of three organs viz. legislature, executive and judiciary. Increase in State activity means increased work for all organs of state yet the largest extension has taken place in the executive powers and functions; meaning thereby administrative organ has become predominant and become all pervading feature of life today. Administration makes policies, provides leadership to legislature and takes manifold decisions. The administration has acquired powers of adjudication over disputes between itself and private individuals and thus have emerged a plethora of tribunals apart from innumerable quasi judicial bodies. In the words of Robson: the hegemony of the executive is now an accomplished fact.

Extension in functions and powers of the executive has replaced normal legislative or Judicial administration of justice. Now the legislature has reduced itself with only laying down broad policies and to leave the rest to administration; thus arose the need of delegated legislation. Administrative justice through administrative adjudication under the modern legislation needs to be provided expeditiously with the least formality and technicality, at the minimum cost. The courts are indeed not in a position to fulfill these conditions. So the for administrative justice administrative tribunals have come in to vogue.

In the quest of administrative justice if a certain rule is found unsuitable in practice, a new rule incorporating the lessons learned from experience can be supplied. Such a flexibility is not available in the case of ordinary judicial process.

The main causes of evolution of the system of administrative justice or adjudication outside the courts are the same which has led to the emergence of delegated legislation.

Along with the expansion in governmental operations, tax base has also been broadened resulting in the levy of new taxes and consequently leading to vast proliferation of assessing authorities. This creates need to provide administrative justice on disputes between citizen and government. This in turn has necessitated the development of Administrative justice or adjudication**.**

Another important reason for the development of the administrative justice is that the ordinary courts are accustomed to deal with cases primarily according to law, the exigencies of the modern administration often make it compulsory that some types of controversies be disposed by applying not the law but by applying consideration of policy. It is possible only through administrative justice or adjudication.

Administrative accountability means administrative answerability or responsibility. For this the office of Ombudsman (Wafaqi Mohtasib) have been established in Pakistan to make the administration answerable for its Administrative actions.

During the period of over 40 years, visible efforts were made to reform the administrative machinery in order to make it more responsive to the needs of an independent country where the objective of the administrative machinery would be to bring about welfare of the common man. These efforts failed due to lack of political commitment. There has been no political will to completely restructure the administrative machinery to make it more responsive to the needs of people.

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It is surprising that the steps towards the establishment of the office of Ombudsman was taken by the Martial Law Regime of General Zia-ul-Haq. He established the office of Federal Ombudsman (Wafaqi Mohtasib)through President's Order 1 of 1983. The objective of the office was mentioned in the Preamble of the President's Order as under:

"Whereas it is expedient to provide for the appointment of Wafaqi Mohtasib (Ombudsman) to diagnose, investigate, redress and rectify any injustice done to a person through mal-administration.

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Lecture 39

Administrative Process: Rule/ policy making

What is meant by administrative process?
The state activism has led to result that to improve physical and economic welfare of people, the state has assumed more and more powers and functions.

What is meant by state activism?
It means assuming more and more powers and functions by the administration in a state.

A state has three organs of a viz., legislature, judiciary and executive. Increase in state activities has meant increased work for all organs of state. Yet the largest extension has taken place at the level of executive cum administrative organ. These day administration is all prevailing feature of life today. It makes policies, provides leadership to the legislature, executes and administers the law and takes manifold decisions. Administration also exercises legislative power and issues a plenty of rules, bye laws, and orders of a general nature which is designated as delegated legislation. The administration has indeed acquired powers of adjudication over disputes between itself and private individuals and thus have emerged a plethora of tribunals diversified in structure, jurisdiction, procedures and powers connected with the administration in varying degree and giving binding decisions like courts.

The administration also got control over extensive power to grant refuse or revoke Licences, impose sanctions and take action of various kinds in its discretion.

To enable the administration to discharge effectively its rule making, adjudicating and other discretionary and regulatory functions, it has been given vast power of inspection, inquiry, investigation, search and seizure etc. these day it is a simple truth that in a modern democratic state, the administration has acquired immense power and discharges varies functions multifarious in scope and consequences. Pertinent here to note that extension in functions and powers of administration has led to the complex socio economic problems which practically can be handled only by administrative process instead of the normal legislative or judicial process. In this regard the legislature has to restrict itself with laying down broad policies and to leave the rest to administration.

Administrative adjudication has arisen enormously as the multitude of cases arising for adjudication under the modern legislation needs to be decided expeditiously with the minimum formality and technicality, at the minimum cost, and by persons having specialized skills to handle such cases. The courts are not in a position to fulfill these conditions. So the administrative tribunals have come in to vogue.

Another advantage of the administrative process is that it could evolve new techniques, processes and instrumentalities and acquire expertise and specification to meet and handle new complex problems of modern society.

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Lecture 40

Legislative Supremacy

What is meant by legislative supremacy?
It means that the President, National Assembly and Senate can pass , amend or repeal laws to any extent and that there are no check and balance on them.

Legislative supremacy in Pakistan
Pakistan is a Federal parliamentary democracy, which requires that the constitution of the state must be in writing, and the governmental functions must be divided into three main organs of a state i.e. legislature, executive and judiciary.

Under the Constitution of Pakistan 1973, the system of government works on the principle of checks and balances, which means no state organ, enjoys supremacy over the other. All the powers of the governmental organs are defined in the constitution. The only thing supreme in a federal democracy is the constitution, by which the legislative and executive functions are divided between the center and the provinces.
So a governmental organ claiming any power must claim it from the constitution alone.
There are two ways in which the role of parliament is important: firstly when it passes legislative enactments and secondly when it amends the constitution.

The legislative activities of the parliament are subject to judicial review before the Supreme Court. The mandate has been provided by the constitution itself. Any law, if violative of the constitutional provisions, may be declared by the Superior Court as having no effect. But the parliament has the power to amend the constitution, including the provisions that form the basis for the exercise of judicial review by the Supreme Court.

As per the literal meaning of Article 239(6), the parliamentary power of amending the constitution is unfettered by any limitation. The provision suggests that there is only one function provided by the constitution which makes the parliament supreme over the other branches of the government.

But the recent short order of the Supreme Court over the 18th Amendment and the recommendations to parliament by the Supreme Court has changed the literal meaning of the constitutional provision.

The superstructure of our legal system is based on the constitution of Pakistan, and in all matters it is the constitution that it is supreme. Parliament and judiciary are the creatures of the constitution, and in matters that are purely judicial, the supremacy of parliament is not allowed to be invoked because it will affect the working of the Superior Courts. The constitution in its various articles protects the independent working of the Superior Court.

Our legal system does not give primacy to one governmental organ over the other, and the system works on the principle of separation of powers and checks and balances. But if the matter is dragged too far in determining the case of superiority as is happening right now, the writer is of the humble opinion that it is the superior judiciary which has a degree of primacy over other institutions not only because of the nature of function it performs but also because it demands high esteem and respect.

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Lecture 41

Non-Judicial Review; Non Adjudicative Control

Administrative Law provides for control over the administration by an outside agency strong enough to prevent injustice to the individual while leaving the administration adequate freedom to enable in to carry on effective government.

In addition to the judicial review, the following are non adjudicative controls:
(1) Statutory remedies
(2) Equitable remedies
(3) Common law remedies
(4) Parliamentary remedies
(5) Self help
(6) Ombudsman

Statutory Remedies:
In addition to the prerogative remedies available to an individual under the Constitution of Pakistan. Remedies are also provided by different statues to aggrieved persons and they are they are as follows:
(a) Civil Suits;
(b) Appeals to Courts;
(c) Appeals to Tribunals;
(d) High Court's power of superintendence; and
(e) Special Leave to Appeal to the Supreme Court.

Civil suit: This is the traditional remedy available to an aggrieved person against an administrative authority. Section 9 of the Code of Civil Procedure 1908 provides that Civil Courts shall have jurisdiction to try all suits of a civil nature excepting suits in which their cognizance is either expressly or impliedly barred.
Remedy (= the means of enforcing a right)
Cognizance (= power to take judicial notice)

Appeals to courts:
In a number of statutes provisions are given for filing appeals or revisions to ordinary courts of law against the decisions taken by administrative authorities. For example under the provisions of the Workman Compensation Act 1932, a person aggrieved of the order passed by the Commissioner may file an appeal in the High Court on a substantial question of law.

Equitable remedies:
Ordinary equitable remedies can be obtained against the administration; and equitable remedies mean remedies usually a non-monetary one such as an injunction or specific performance. Under this head the following remedies are available to an aggrieved person against administration:
(a) Declaration; and
(b) Injunction

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Declaration:
Ina declaratory action, the rights of the parties are declared without any further relief. The essence of a declaratory judgment is that it states the rights or legal position of the parties as they stand. Meaning thereby a declaratory judgment by itself merely states some existing legal position.

Injunction:
An injunction is an order of a court addressed to a party to proceeding before it requiring him to refrain from doing, or to do a particular act. Injunction is of following two types:

1. Prohibitory injunction
2. Mandatory injunction

Generally injunction is a negative remedy and in Administrative Law, it is granted when an Administrative authority does any thing ultra vires.

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Lecture 42

Tort Liability of Public Authority

Before we begin with the 'Tort Liability of Public Authority', it is of utmost importance to, first, discuss as to what is Tort?

What is Tort?

Tort is a civil wrong for which the remedy is a Common law action for un-liquidated damages and which is not exclusively the breach of a contract or the breach of a trust or other merely equitable obligations.

Civil wrong (=a violation of non-criminal law)
Remedy (=the means of redressing a wrong)
Common law action (= a civil judicial proceeding at Common law)
Unliquidated damages (=damages that cannot be determined by a fixed formula and must be established by a judge or jury.)
Exclusively (=entirely)

Breach (=violation)
Contract (=an agreement between two or more parties creating obligations that are enforceable at law.)
Trust (=the right, enforceable solely in equity, to the beneficial enjoyment of property to which another person holds the legal title.)
Equitable obligation(=just; existing under the principles of equity)

Thus, tort is a violation of non-criminal law for which the means of redressing the wrong is a civil judicial proceedings at common law for damages that cannot be determined by a fixed formula and must be established by a judge or jury and which is not entirely the breach of contract or the violation of trust or other obligations existing under the principles of equity.

Public Authority:
An authority or governmental agency that administers a public enterprise.
Many examples can be found of the application of the law of negligence to public authorities engaged in providing services such as public transport, gas, health and electricity, water and sewerage, all of which are classed as "proprietary" functions.

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Lecture 43

What is Negligence?

Introduction:
The term 'negligence' is a 'noun' meaning 'failure to give somebody or something care or attention'. Care means be concerned or be bothered.

Synonyms of the term 'negligence':
The synonyms are: carelessness; inattentive omission.

Salmond's Definition of 'Negligence':
"Negligence is the state of mind of undue indifferences towards one's conduct and its consequences"

State (=condition; position)
Undue (=excessive; unjustified; too much)
Indifference (=lack of interest; unresponsiveness)
Towards (= in the direction of)
Conduct (=behavior)
Consequences (=results; penalty)
Thus, in other words, negligence is the condition of mind of excessive unresponsiveness towards one's behavior and its results.

Concept of negligence with particular emphasis on 'duty of care' and 'standard of care':
The concept of 'negligence' has the following contents:
1. A legal duty to take care
2. Breach of the duty &
3. Consequential Damage

In equation form negligence may be described as under:
Negligence =
a legal duty to care > breach of the duty > consequential damage.

Duty to Take Care:
No one can be proved negligent unless in limine facts establish that there exists, on the part of the other, 'a legal duty to take care'. Duty means when circumstances place one individual in such a position with regard to another that thinking persons of ordinary sense would recognize the danger of injury to the other if ordinary skill or care were not used.

In limine (=at the outset; preliminary)
The facts of the case 'Donoghue versus Stevenson' [(1932) AC.562] were that the defendant was a manufacturer of ginger bear. He supplied the retailer 'an opaque ginger bear bottle' containing a decomposing snail. A lady consumed it and fell seriously ill. She filed a suit against the defendant alleging that the defendant owed her a duty to take care. The court held the defendant negligent.
Ginger (= carroty; auburn; red)
Opaque (= dense; thick; solid; not clear)

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Standard of Care:
'Standard of care', in the perspective of 'negligence', means 'the degree of care that a reasonable person should exercise' in a given situation. As per English law, a person under a 'duty to take care' is bound to adopt reasonable standard of care. The expression 'reasonable' is an abstract term which means 'based on the rules of logic in which ideas or facts are based on other true ideas or facts'. The reasonableness of standard of care varies from situation to situation and time to time.

To determine, what will be the reasonable standard of care in a given situation requires determination of the following two points:
The magnitude of risk to which others are exposed.
The importance of the object to be obtained by the dangerous form of activity.
The reasonableness of standard of care depends upon the fair relationship of the two points. To expose others to danger for an unfair object is unreasonable. For example a train that speeds 80 KM per hour gets the others exposed to a risk of accident but the object of getting the passenger on the destination, within minimum time, is considered public convenience. Thus, speeding at 80 Km per hour is the reasonable standard of care observed by train drivers.

Damage:
The third essential of tort of negligence is causation of damage to the aggrieved. A compensation claim based on tort of negligence cannot succeed unless proved that the damage actually happened to the aggrieved.

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Lecture 44

The 'But for' test

To gauge the cause of damage, the test: 'but for test' is applied. The respondent can prove that it was not his fault and the damage would have happened to the aggrieved any way.

Example:
A patient suffering arsenic poisoning was brought to a causality doctor of a government hospital who did not give him treatment rather send him to his own doctor. The patient died. It was alleged that the patient died due to the negligence of the casualty doctor. It was held that the death was not caused by the doctor's negligence; he had to die anyway.

A direct relationship between cause and damage must exist to hold a public authority negligent.
Example
A premature baby, after birth, suffered blindness. It was alleged that the government doctor was responsible for the blindness as he gave the baby high doses of oxygen. The respondent provided the court six probable causes for the blindness of the baby. It was held that it was very difficult to determine as to what caused blindness to the baby. therefore, the doctor employed the Public authority could not be held negligent.

Public authority is not held negligent, where, it is proved that the injury was caused due to the fault of the employee.
Example:
The claimant a handicapped of leg, while working as an employee did not ask for a flight of stairs; consequently he fell down and got injured. He brought an action of negligence against the employer Public authority. It was held that his failing to ask for the assistance was a sufficient evidence as to prove that he was himself responsible for the injury.

A public authority is not negligent when accident is caused by the negligence of third party.
Example:
In a road accident a Police officer colliding with the defendant vehicle was killed. The respondent argued successfully that the accident was caused as the other Police inspector was negligently handling traffic control. The defendant was held not negligent as there was no causation between the death and the defendant's acts.
Causation (= the process of one event causing or producing another event)

DUTY
BREACH
CAUSATION
+
DAMAGES
NEGLIGENCE

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Lecture 45

Defenses to Negligence

Following are the defences of negligence:
(1) Contributory negligence
(2) Volenti non fit injuria

Contributory negligence:
Contributory negligence is a plaintiff's own negligence that played a part in causing the plaintiff's injury and that is significant enough to bar the plaintiff from recovering damages.

Relevant Case Law:
Sayers v Harlow UDC 1958
The claimant got injured while trying to climb out from a public toilet having defective lock. It was held that the claimant contributed to her injuries by climbing from the toilet.

Volenti non fit injuria:
Volenti non fit injuria means 'there is no injury to one who consents'.

Relevant Case Law: ICI v Shatwell 1965
The claimants, while using detonators, did not observe statutory safety precautions and got injury. The defendant's defence: 'volenti non fit injuria' (there is no injury to one who consents) was up held.
Upheld (= endorsed)

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