

Theories of Constitutional Interpretation:

(An Analytical Study of Case Law in Pakistan)

**A Research Proposal of Ph.D. (Law) submitted to the Department of Law, Faculty of
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Jan. 2016

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1. Thesis Statement

The superior judiciary has to adopt a theory (or theories) of its own, for interpretation of Constitution, instead of following the foreign theories, that may suit the peculiar characteristics of the Pakistani Constitution, which is much different from the contemporary constitutions, and that is the only way to meet the challenges of the progressing and changing society of Pakistan.

2. Introduction

How should the courts interpret the Constitution is one of the important questions. There are many theories on the subject. Some scholars tend towards the traditional theories of literal meaning and some favor intent-based interpretation, while some others advocate the dynamic theory.

The interpretation gets much more important when it comes to constitutional cases. Sometimes it may go to the fundamental questions of jurisprudence, like the social contracts of the society, the ultimate rule of law, the Grund-norm and the debate of legal and political constitutionalism.

The decision of the Supreme Court in the 18th and 21st Amendment case has added to the discussion of Supremacy of the Parliament versus supremacy of the Courts. In other words, the conflict between the Political constitutionalism and the legal constitutionalism has embarked in

the Lego-political discussion in Pakistan. The court in its short order avoided to interfere in the powers of the parliament, thus referred the matter of appointment of judges to the parliament.[1]The detailed judgment strengthened the idea of the supremacy of the parliament by upholding the 21st amendment and the military courts. The dissenting opinion of J. Jawad S Khwaja, however, shows the contrasting position of the basic structure of the constitution, which are excluded from the powers of the parliament to amend. The conflicting opinions, in the matter at hand, are based on the way the judges interpret the constitution.

It will be interesting for a law student to categorize the constitutional cases of Pakistan with respect to the theories of interpretation. That is therefore this proposed work is aiming to explore that what has been position of the judiciary in Pakistan, during interpreting the Constitution. Whether the courts have been applying the same theory or have been shuffling between the different theories, and has a particular theory has been dominating a particular era? This study shall find the answer to the questions.

The Pakistani Constitutional law has its roots in different legal systems. Some of the provisions have been incorporated in it under the influence of the Islamic rules, some other are based purely on the UK system, and some other on the US constitutional framework. While interpreting constitution the courts keep all these systems in their mind. In other words, the Constitutional provisions are interpreted in the light of separate, and sometimes opposite, systems simultaneously. How the courts deal with the cases, where opposite, or different, results emerge from interpreting the same provision. This study will find out what role is played by the theories of interpretation when the courts deal with the said cases, and would find what would be the suitable theory of interpretation in Pakistani context.

Statutes make up the bulk of the relevant laws at federal and provincial levels. How the courts shall interpret these statutes, is one of the important questions. There are many theories on the subject. Some scholars tend towards the traditional theories of literal meaning and some favor intent-based interpretation, while some other advocates the dynamic theory.[2]

Among the demerits of the law is that it is backward and conservative. This is very much true for the constitution as well. In the words of Salmond, “.....its failure to conform itself to those changes in circumstances and in men's views of truth and justice, which are inevitably brought about by the lapse of time.”^[3] The societies keep on changing, while the law and its rules still sticking to its old heritage. The statutes and precedent both play their role in such conservatism and backwardness. The ‘original meaning rule’ and the ‘[plain meaning rule](#)’ of interpretation add to the conservatism further. The dynamic rule, however, cures the problem by providing an opportunity to the law to keep itself adapted to the changing world, even without involving the parliament.

3. Theoretical Framework

The Pakistani Constitution, and its interpretation, is influenced by three different systems. The UK system influences it by the heritage of the British Rule. The US system leads it because of the similarity between the US and Pakistani Constitutional system, both being Federation having written and rigid constitutions. The Islamic ideology is nonetheless the core of the Pakistan movement, the center of the ideas of the founding fathers of the state and nation, and thus cannot be ignored at any stage of the constitutional debates.

The Political and judicial system of Pakistan, and its constitution has its roots in the Common law system. It lays its foundation on the British heritage. It generally follows the scheme that was

given under the Indian Government Act, 1935. In 1973's constitution, like the Act of 1935, the parliamentary form of the government was established, and the state was declared as a federation. Though Pakistan inherits the British system, but still there some fundamental differences in both systems, for example the UK, unlike Pakistan, is a unitary state, having no written constitution, the Parliament can make and unmake any law whenever it wants, and the courts having no power of judicial review. The features, like being federation, having written and rigid constitution, salient features of the Constitution and courts having power of judicial review, make the Pakistani system closer, and resembling, to the US system. The Islamic factor of the Pakistani society and Constitution make the Constitutional system of Pakistan more difficult to understand and interpret it. This factor plays an important role in making the Pakistani Constitution unique in its nature and framework.

The UK courts do not interfere in the province of the Parliament. There is no written constitution. The court is bound to follow the Acts of the Parliament, and have no power to check the legitimacy of the Acts passed by the Parliament. The law in the UK is very simple on the issue, that is to say "*An Act of Parliament can do no wrong, though it may do several things that may look pretty odd.*" [4] Some sectors in Pakistan support this sort of constitutionalism. The judgment of the Supreme Court in Hakim Khan Case^[5] is in line with this theory.

In the US, there are three main theories regarding constitutional interpretation, giving weight to the intention and thoughts of the founding fathers, the original meaning rule of interpretation [6], the literalist or textualist approach [7] and the dynamic interpretation [8]. In Pakistan, the judiciary has followed, in different cases, all the three rules, even there appear different approaches adopted by different judges in the same case.[9]

The Islamic rule of interpretation is that the injunctions of Islam should stand first to all other things. The rule was accepted by the Lahore High Court while deciding the issue of conflict between Article 2A and Article 45 of the Constitution. The decision of the court was later on over-ruled by the *Hakim Khan case* [10]. In *Bank of Oman case* [11] Justice Tanzeel-Ur-Rahman held that Injunctions of Islam, by the virtue of Article 2A, were the touchstone for checking the legitimacy of a given law.

In short, it can be observed that there are almost five different theories of interpretation in Pakistan. The first is of Supremacy of the Parliament, the second is the supremacy of the Supra-constitutional documents (if any), the third is supremacy of the Islamic injunction, the fourth is the literalist approach, and the fifth is the dynamic interpretation of the constitution.

The Pakistani Constitution is a unique blend of different systems. The different Articles of the constitution, being based on three different systems, may lead us to different conclusions, in a given case. These conclusions may sometimes be completely opposite to each other. Therefore, judiciary shall develop its own theory or theories for interpretation of this unique document, which may suit the peculiar features of Pakistani Constitution.

4. Statement of the Research Problems

- i.* What theory(ies) of interpretation is (are) followed by the superior judiciary of Pakistan?
- ii.* How do the courts interpret the constitution?
- iii.* Do the theories that are followed in the UK, which has no written constitution, sufficient for interpreting the Pakistani constitution?

- iv. Is it well working when the Pakistani judiciary places reliance merely on the US Supreme Court decisions?
- v. Pakistani Constitution has got a unique characteristic to be an amalgam of different legal and constitutional systems, thus a theory of interpretation, which has its origin in a particular system, cannot satisfy the needs of this Constitution. How? And what to do then?
- vi. Is there any conciliation between different legal and constitutional systems? In addition, if any, what is the role of the judiciary in such conciliation?
- vii. How can we categorize the decisions of our judiciary from the perspective of the theories of interpretation?
- viii. Should the judges be inspired by Grund-norm (if any) in interpreting statutes?
- ix. Are the courts custodian of the Constitution only, or they shall take in account well of the setting parliament?
- x. Should legislative history be, or not be, relevant in interpreting the Constitution?

5. Objectives of the study

- i. The study will try to find out the theories of constitutional interpretation that have been used in case law of Pakistan.
- ii. It will categorize Pakistani constitutional case law in the light of these theories.
- iii. It will evaluate important decisions of Pakistani Courts, in the light of these theories.
- iv. It will explore that either, or not the trend of interpretation had changed with change in the governments.

v. It will strive to dig out what have been the effects of the military governments on interpretation of the Constitution, from the angle of these theories.

6. Significance of the study

i. The study will be helpful to the judges and Lawyers, as it will explore new dimensions in construing the constitution.

ii. The study will also be helpful for teachers and students of law. It will provide them a new look into the subject of interpretation.

iii. It will try to find out, and categorize the theories followed by Pakistani courts from time to time.

iv. It will also provide a database for the discourse of Constitutionalism in Pakistan.

v. It will help the civil society in understanding the court's decisions from different angles, like democracy, fundamental rights, basic structure of the constitution and the Islamic principles that are enshrined in the constitution.

7. Literature review

The Supreme Court in *Reference No. 1 of 2012* held that the Constitution being a living organ was to be interpreted dynamically, as a whole, to give harmonious meaning to every Article of the Constitution. In the Court's opinion, the Constitution, being an organic document, had to be conceived in a manner to apply to all situations that might arise. To make the constitution fit for all situations, the words and phrases used in the constitution, in such a sense, have no fixed meaning, and must receive interpretation based on the experience of the people. However, in

interpretation of statutes, other than the Constitution, the courts give priority to the *legislative-intent rule*. The Court held that function of the Court, in interpreting statutes, was to discover the *true legislative intent* and to promote *purpose of the enactment*.^[12]

In *Pir Sabir Shah Case*, two learned judges advocated for a dynamic approach in constitutional interpretation. Ajmal Mian, J., held that the approach of the court should be dynamic, progressive, and liberal in interpreting the constitution. He further noted that dynamic approach could not be negated by emphasis on *expressiouniusestexclusionalterium*.^[13] In the same way, Saleem Akhter, J., held that the constitution, being assimilation of the past, present and future for generation after generation, approach to such a document should be liberal and progressive. The learned judge, however, makes such dynamic approach subject to the condition that it should not do any violence to the language, fundamental principles of the constitution and fundamental rights.^[14]

Ajmal Mian, J., in *Muhammad Nawaz Sharif v. President of Pakistan* ^[15], observed that there was a marked difference between a constitutional provision containing a fundamental right and a provision of an ordinary statute. A constitutional provision containing fundamental rights is intended to cater for all time to come; therefore, the court should adopt a dynamic, liberal, and progressive approach, in interpreting such provisions. The judge has been influenced by utilitarianism as well, as he holds that the purpose of the dynamic approach is *to extend the benefit to the maximum possible*.

In contrast to the dynamic interpretation, we also find the courts repeatedly recognizing and applying the traditional principles of *originalism* and *the plain meaning rule*. For example, the Lahore High Court has given the basic principles concisely in *Ch. Maqbool Ahmad v. Malik*

Falak Shair Farooq.^[16] It is noteworthy that the Court has relied upon a book titled English Legal System by *Smith and Bailly*, the third Edition. The Court said:

Statutory interpretation has been a subject of debate among lawyers, jurists and judges down the ages. Methods of statutory interpretation have not been generally regulated by the parliament or the lawmaker. These have been evolved by the judges. These modes have varied in time and space. The various modes ultimately culminated in what the jurists have termed as 'rules of interpretation'. These rules, broadly speaking, are as under:

1. The Mischief rule
2. The literal rule
3. The golden rule; [and]
4. The united contextual approach.

In the decision, the court has supported the United Contextual approach. The court that the *general words used in a text* cannot be read in isolation from the document in which they appear. The Court must read the statute in whole while interpreting a word.

In the same manner, the Supreme Court supported the Mischief rule in *Riaz Hussain v. Muhammad Akber*.^[17] The Court held that the statute must be interpreted in a manner which suppresses the mischief. While interpreting Section 4[18] of the Muslim Family Law Ordinance, 1961 of the Peshawar High Court [19] adopted a literalist approach, by enforcing the apparent meaning of the section, but in contrast, the Lahore High Court [20] went for the intent-based interpretation. The Supreme Court [21] endorsed decision of the later court.[22]

The rule is supported by the SC (AJK) as follows:

[The] purpose of enactment cannot be bypassed, floated or otherwise defeated by resorting to technicalities, and the purpose intention must be the prime consideration.....legislative purpose was the reason why a particular enactment was passed by the legislature.^[23]

The SC expressed its view on Harmonization by saying that the court favors the harmonious interpretation of provisions within a statute and even of different statutes as well. The Court mentions that one of the purposes of the harmonious is to avoid pitching different constitutional courts against each other. In another case,^[24] the Court held that every word in a statute is to be assigned some meaning and of course, all provisions, ostensibly conflicting, have to be reconciled.

Ameer Khathun v. Faiz Muhammad [25] describes how to deal with apparently conflicting provisions of a law. The court noted three principles for dealing with such provisions. The first principle is to harmonize that provision which creates difficulty, with other provisions of the same Act. The second is to keep the provision in consistency with the laws, which are relevant, or have nexus to the Act, in which the provision appears. The third, the provision shall be interpreted in a way as to harmonize it with the paramount law. If the provision fails to conform to the paramount law, better is to strike down it, as ultra vires the paramount law.

Art.227 of the Constitution requires all existing laws to be brought in conformity with the injunction of Islam.^[26] The Article has driven the courts to another sort of harmonization; that is to harmonize laws with the injunctions of Islam. The Supreme Court held that until the existing laws are brought in conformity with the injunctions of Islam, their interpretation should be done in accordance with the Islamic philosophy, its common law, and jurisprudence.^[27]

The theories play their role in the constitutional cases. For example, the Governor General reference No. 1 of 1954^[28], where the Doctrine of Necessity was recognized. The Doctrine has been repeatedly applied by the courts in *Begum Nusrat Bhutto* case^[29], *Syed Zafar Ali Shah and others vs. General Pervez Musharaf*^[30], and *Tika Iqbal Muhammad khan vs. General Pervez*

Musharaf.^[31] The *Kelson's theory* was used in the *Dosso's case*.^[32] It can be rightly said that the courts have been interpreting laws in accordance with the Positive theory of interpretation.

There are some questions, which have always attracted, and would continue to do so, attention of the legal community in Pakistan. The courts have adopted different positions in answering these questions from time to time. The theories of interpretation play a great role when the judges handle such questions. Among these questions some are:

- i. Is there, or not, any basic structure of the constitution?
- ii. What is the status of the Objectives Resolution, either it is, or not, a supra-constitutional document?
- iii. What is the true meaning of the term *injunctions of Islam*?
- iv. When to strike out a provision of a law based on being against the fundamental rights?
- v. Whether an amendment to the Constitution can be challenged in the Supreme Court?
- vi. Can the Court annul a Constitutional amendment? and if yes, on what grounds?[33]

Saeed-uz-Zaman Siddiqi, J., has adopted a strict literalist approach. To him, the court shall strictly stick to the wording of the constitution. He held:

Suffice is to say that the court, while interpreting the written constitution, will go by the wording of the document, and will not allow it to be influenced or

overridden by any extraneous principles of the other constitutions, not explicitly incorporated in the scheme chosen by the framers of the constitution.[34]

Dortzbach evaluates the use of the legislative history in the light of the two contrasting approaches of Justice *Scalia* [35] and Justice *Breyer* [36]. Justice *Breyer* supports the use of the legislative history *to find out the intention of the parliament*, while Justice *Scalia* would rely on the history *only to dig out meaning of statute*, but not the intention of the legislature.[37] The difference of opinion between the two respected judges is helpful in understanding the theories of interpretation. It will help us in categorizing the case law of Pakistan, and evaluating it by comparing it with the US case law.

Eskridge, along with *Philip P. Frickey* [38], elaborate their point over the need for dynamic interpretation. They provide:

How do judges interpret statutes? How should they? Many commentators argue that judicial interpretation is, or at least ought to be, inspired by grand theory. We think these commentators are wrong, both descriptively and normatively: Judges' approaches to statutory interpretation are generally eclectic, not inspired by any grand theory, and this is a good methodology.[39]

Eskridge in the above works attempts to establish the theory of dynamic interpretation. It discusses the decisions of the US Supreme Court. The book will provide for our research a guideline to find out either, or not, Pakistani Courts utilize the dynamic interpretation?

In *Looking It Up: Dictionaries and Statutory Interpretation* Justice *Scalia* urges that the judges should adopt the *original meaning*, the meaning that was intended by the lawmaker at the time of legislation. He denies the *evolving meaning over time*. To him, the judges should accord to the text, structure, and history of the document being interpreted.[40]

Constitutional Theory in a Nutshell [41] by Thomas E. Baker provides theoretical approaches in the constitutional interpretation, and the relation between the interpretation and the contemporary schools of legal philosophy.

The preface of *Crawford's Statutory Construction* [42] describes the one who might have a better examination of the interpretation of statutes, in the following words:

No one can better appreciate the formidable task of preparing a practical and comprehensive treatise on the construction and interpretation of statute than he, who has examined, even though but casually, the myriads of reported cases, the numerous statutes, and the various secondary sources of law which pertain to our subject.^[43]

The book contains a detailed discussion over different topics of statutory interpretation. It at first discusses the legislation, statutes, kinds of statutes, and parts of a statute. The work then focuses on the Construction of statutes. There are separate chapters for each, the process of interpretation, linguistic, and grammatical construction, the internal and external aid for construction.

The interpretation plays an important role in shaping the constitutional law. *Arum Sagar* argues that the general interpretive philosophy underlying the judicial approach has a huge impact on the balance of power in a federation; an *originalist* interpretation tends to favor the constituent units, while progressive or 'living' constitutionalism tends to have a centripetal effect.[44] Pakistan always has been witnessed struggles between *the strong center* and powerful provinces.

Sujith Choudhry illustrates why in India the Comparative Constitutional Interpretation should be accepted. According to him under the influence of globalization, the world is going towards the cosmopolitan jurisprudence, which has affected the constitutional cases as well.^[45]

‘*A Positive Theory of Statutory Interpretation*’ by John A. Fere John and Barry R. Wingast^[46] presents that the judicial interpretation is influenced, in some way or the other, by political power. They assert that the courts must construe the statute in the light of ongoing political situations, and according to the wish and opinion of the sitting legislator. This theory is also, somewhat, similar to the dynamic theory.

‘*Statutory Interpretation and Human Rights*’ by Rt. Hon. Lady Justice Arden, DBE^[47] has elaborated the rules of interpretation from the angle of human rights. The paper discusses different legal systems and statutes; with reference to the protection of the rights by the courts.

‘*The Theory and Practice of Statutory Interpretation*’ by Frank B. Cross^[48] offers a comprehensive analysis of statutory interpretation and includes extensive empirical evidence of the US Supreme Court practice. He reviews the active disputes over the appropriate approaches to statutory interpretations, namely whether courts should rely exclusively on the text or also examine the legislative history. The book then considers the use of these approaches by the justices.

‘*Statutory Interpretation and the Intentional(ist) Stance*’^[49] explains that the judges should strive to find out the meaning *of the statute*, rather than the intent *of the parliament*. The article believes that it is not always possible to know the intention of the lawmaker, while possibility of discovering *the meaning of the statute* does always exist.

All the above discourses about the theories of interpretation are very much relevant and important for our study. These explore new dimensions in the constitutional interpretation.

However, the proposed work is somewhat different from the above for the following reasons.

- i. These books and articles do not touch the Islamic law at all.
- ii. They discuss the US constitution and Judiciary, while our focus will be on the Pakistani Constitution and Superior Courts.
- iii. Most of the above works try to support one theory or the other, while this proposed work aims to find out what might be the theories that had been followed by our Courts.
- iv. Most of the above studies tend towards deductive arguments, whereas we will be having inductive arguments.
- v. In the US, the democratic norms are well established, and the Judiciary enjoys independence and freedom from the executive organ of the government. On the other hand, in Pakistan, we have experienced, from time to time, constitutional breakdowns, which have negatively affected our judiciary. In this case, examining the decision of our superior courts will be much helpful in the Pakistani context.
- vi. The Pakistani legal system differs from the American system, when it comes to the Islamic provisions of the Constitution; especially the Art.2 A of 1973' Constitution. The proposed study shall also be focusing on these issues, which are not found in the American and European systems.

Richard H. Fallon, Jr ^[50] has discussed the ongoing debate between the ' *textualist*' and *purposivism*' ^[51] theories of statutory interpretation. He mentions that even the *textualist* also tends toward intent-based decision, by recognizing the contextual meaning of a word or phrase. ^[52]

The interpretation generally revolves around “the plain meaning” and “the original intent of the legislator”. The traditional theories of interpretation suggest that a ‘word’ or ‘text’ in a statute should be given the meaning that was intended for it by the law-making body during the legislation. However, these theories are contradicted by the Dynamic theory of interpretation.

William N. Eskridge ^[53] in his book ‘*The Practice of Dynamic Statutory Interpretation*’ ^[54] asserts that statutory interpretation changes with the passage of time. A word or text used in a statute acquires new meaning in changed circumstances. It claims that as a matter of practice and theory the statutory interpretation of the constitution is also dynamic.

Bennion on Statute Law ^[55] describes the techniques of processing the legal text and techniques of interpretation. The book also deals with dynamic and static processing of text. It is a good book and will be helpful.

“*Interpretation of Statutes*” ^[56] By *Dr. A.B. Kafaliya*, and “*Law of Interpretation*” by *Maxwell and Craze*”, And “*A Commentary on the Interpretations of Statutes*” ^[57] By *G. A. Endlichhave* discussed different aspects of the interpretation. They follow almost a similar scheme. Almost all of them contain the traditional rules of interpretation, like the ‘*plain meaning rule*’, and ‘*the Golden rule*’. These books also contain the basic techniques of statutory construction called Canons of Construction, like ‘every word and clause must be given effect’ and ‘a statute cannot go beyond its text. ‘*A. S. Bindra’s Interpretation of Statute*’ ^[58] highlights the subject in Indian context.

These books, however, do neither discuss the theories of interpretation, nor Pakistani case law. These books are general in nature, and discuss both the constitution and the statutes, though they are meant mainly for statutory interpretation. The scope of these books is much expanded. While

our work will be focusing on the interpretation of the Constitution, and the rules, concepts and the theories used therein. Therefore, we are still in need of a work, which may find out how the Pakistani Courts deal with the Constitutional provisions during interpretation.

“*Understanding Statutes*”^[59] by *S. M. Zafar* has done extensive work on the topic. It has English principles, rules, and maxims. The work contains English, Indian, and Pakistani case law. The book differs from others in respect that it has touched the Islamic rules of interpretation.^[60] It has also tried to compare the English rules with Islamic system;

“*Interpretation of Statutes: With General Clauses Acts*”^[61] by *M. Mehmood* has covered the English system of interpretation in respect to Indian laws. The work is knowledgeable in understanding the rules adopted by the courts in our country; and to understand that these rules have played their role in Pakistan.

Qaiser Javed Mian^[62] in his research titled *Statute Interpretation*,^[63] has compiled almost eighty-five rules that have been adopted by Pakistani courts. The research work has 61 case laws. This research will be very helpful in our proposed study. The work discusses those principles that have been generally discussed in the above given books. It does not deal with the theories of interpretation.

Although the above books provide the relevant Pakistani case law beneath the rules of interpretation, the problem remains. As none of them, neither establishes any theory of constitutional interpretation, nor do they link the case law with the already existing theories. Further, these books are not specific to the constitutional case law, as the proposed work will be.

Dr. Naseem Razi has carried out her Ph.D. research work on a related topic. Her research topic is “*Interpretation of Statutes: a critical analysis of Islamic jurisprudence*”. The work covers English rules of interpretation of statutes and *Ad-Dila lath* from the Islamic rules. The study has also discussed the role of *Ijtihad*. The conclusion of the work is, as it appears, that there should be re-interpretation of the Islamic legal text, under the doctrine of *Ijtihad* to meet challenges of the modern times.

This work differs from my proposed work for the below mentioned reasons:

- i. The work does not study Pakistani laws.
- ii. It does not discuss the modern theories of interpretation.
- iii. It does not discuss any case law.
- iv. The approach of the researcher is theoretical, whereas this work would study case law.

In short, it can be said that, until now there is no such work, which studies the decision of the Pakistani judiciary in the light of different theories of interpretation. Therefore, this work will contribute to the status of literature in the domestic sphere.

8. Research Methodology

The following methodology will be followed in the research work.

- i. The study will critically analyze the constitutional case law of Pakistan in the light of the theories of constitutional interpretation.

- ii. It will explore what foreign theories are followed by our Superior judiciary, and where and why these theories fall short in Pakistani context.
- iii. The rules of the UK system will be mainly taken from Maxwell's book.
- iv. For the US theories main reliance will be made on the works of Justice Scalia and Justice Bryer.
- v. The decisions of the Courts will be compared with each other if two different decisions are arrived upon on the same point of law, in the result of applying different theories.
- vi. This study will also dig out what Islamic rules of interpretation do the Federal Shariat Court follow, and what it has to do?
- vii. A special focus will be given to the cases where the FSC differs from other courts, relying on some Islamic provision.
- viii. Where the case will relate to the Islamic laws, a critical analysis of the case will be carried out, in the light of the Islamic rules and laws, especially from the perspective of *Hanafi Fiqh*.

9. Limitations

- i. The law will study primarily the Pakistani Constitutional Case law; however, where necessary the US, UK and Indian Case law will be discussed.
- ii. This work will be limited to decisions of the Supreme Court and the Federal Shariat Court, in rare cases it may discuss the decision of the High Courts as well.

- iii. It will focus on reported case law only.
- iv. In the US cases, it will be limited to the judgments of the Supreme Court only.
- v. In the US theories, our focus will be on the work of *Justice Scalia* and *Justice Bryer* only.
- vi. For the purposes of common law rules, only the UK constitutional system and cases will be consulted.

10. Structure of the Study

The study will consist of the following main chapters.

- i. Introduction of Pakistani Legal System

This chapter will introduce the Pakistani Legal System. It will also describe the Common Law and Islamic background of the Pakistani system.

- ii. The Theories of Constitutional Interpretation in the US

This chapter will be dedicated to different theories that are dominating the US constitutional debate, between the conservative and liberal classes of the US Supreme Court Judges. It will also find out which Pakistani decision has been based on the US decisions.

- iii. The Theories of Constitutional Interpretation in the UK and the other Common Law Countries (Especially India)

This chapter will discuss the theories of interpretation in the UK and other common law countries. It will also explore where the Pakistani Judiciary follows the UK precedents.

iv. Interpretation of the Constitution in Pakistan

This Chapter will discuss the theories that have been followed until now in Pakistan. It will also dig out the difference of opinion among different judges about the constitutional interpretation. This section shall focus on the changing trends of interpretation from time to time, with special focus on the trends during military and civil governments. It will categorize the case law based on the different theories.

v. Critical Analysis of the Theories used in Pakistani Case law.

The fifth chapter shall evaluate the case law. The case law will be critically analyzed. It will differentiate between those decisions that have satisfied the needs of the Pakistani society from those that have failed to do so.

This chapter will also describe how these theories fail to suit the Pakistani Constitutional framework, and will show what would be the suitable theory for interpretation of the Pakistan Constitution.

vi. The future perspective, Recommendation and Conclusion.

[1] *Nadeem Ahmed, Advocate v Federation of Pakistan* 2010 SC 1165.

[2] Frank B. Cross, *The Theory and Practice of Statutory Interpretation*, (Stanford Law Books, 2012)

[3] Sir John Salmond, *Jurisprudence*, (London: Sweet and Maxwell Limited, London, 1902), p.24.

[4] *City of London v. Wood*, 88 Eng. Rep. 1592, 1602 (1700)

[5] *Hakim Khan v. Government of Pakistan* 1992 SC 595.

[6] Originalists think that the best way to interpret the Constitution is to determine how the Framers intended the Constitution to be interpreted. They look to several sources to determine this intent, including the contemporary writings of the framers, newspaper articles, the Federalist Papers, and the notes from the Constitutional Convention itself.

[7] The textualist approach relies upon the literal or textual meaning of the words only. on the other hand, originalists, apart from considering the literal meaning of the words, also consider other things, which may lead the court to discover the true intention of the law-maker at the very time of drafting the document, for example legislative history.

[8] According to the Dynamic interpretation the constitution is a living organ. It changes with the changing society. A word or text used in a statute or constitution acquires new meaning in changed circumstances. They argue that should the framers be alive today, that would have been taking the same meaning as it is taken today from a word.

[9] For example, see the judgment of the Supreme Court of Pakistan on the 21st amendment.

[10] *Hakim Khan v. Government of Pakistan*, PLD 1992 SC 595.

[11] *Messrs. Bank of Oman Lid Vs Messrs East Trading Co. Ltd and others*, PLD 1987 Karachi 404.

[12] Reference No. 1 of 2012, PLD 2013 SC 279.

[13] *Pir Sabir Shah v. Shah Muhammad Khan*, PLD 1992 SC 66, As per Ajmal Mian, J., at 179.

[14] *Ibid.*, per Saleem Akhter, at 192 (ZZ).

[15] *Muhammad Nawaz Sharif v. President of Pakistan*, PLD 1993 SC 473, Per Ajmal Mian, J, at 674 (H).

[16] *Ch. Maqbool Ahmad v. Malik Falak Shair Farooq*, PLD 2003 Lah. 138.

[17] *Riaz Hussain v. Muhammad Akber*, 2003 SCMR 181.

[18] The section reads as: “In the event of the death of any son or daughter of the propositus before opening of succession, the children of such son or daughter, if any, living at the time the succession opens, shall *per stirpes* receive a share equivalent to the share which such son or daughter, as the case may be, would have received if alive.”

[19] *Mst. Zarina Jan v. Mst. Akbar Jan*, PLD 1975 Peshawar 252.

[20] *Kamal Khan v. Mst. Zainab* 1983 Lahore 546, PLD 1983 Lahore 546.

[21] *Mst. Zainab v. Kamal Khan*, PLD 1990 SC 1051.

[22] See: Muhammad Munir, “The Share of Orphaned Grandchildren under Islamic Law and Pakistani Legal System: A Re-Evaluation of Representational Succession in Section 4

of the Muslim Family Laws Ordinance 1961". Available at SSRN: <http://ssrn.com/abstract=2435569> (last accessed 15.01.15).

[23] *Syed Shujaat Hussain Kazmi v. Mst. Nazish Kazmi*, 2007 CLC 1771.

[24] 2008PTD 202 (SC).

[25] *Ameer Khatun v. Faiz Muhammad*, PLD 1990 SC 787.

[26] Article 227(1), The Constitution of the Islamic Republic of Pakistan, 1973. It reads as:

All existing laws shall be brought in conformity with the Injunctions of Islam as laid down in the Holy Quran and Sunnah, in this Part referred to as the Injunctions of Islam, and no law shall be enacted which is repugnant to such Injunctions.

[27] *Commissioner of Income Tax Peshawar v. M/S Siemen*, PLD 1990 SC 368.

[28] *Governor General reference No. 1 of 1954*, PLD 1955 FC 435.

[29] *Begum Nusrat Bhutto v. Chief of Army Staff*, PLD 1972 SC 183.

[30] *Syed Zafar Ali Shah and others vs. General Pervez Musharaf*, PLD 2000 SC 869.

[31] *Tika Iqbal Muhammad Khan v. General Pervaiz Musharaf*, PLD 2008 SC 6 and 178, 2008 PTD 202.

[32] *The State v Dosso*, PLD 1958 SC 533.

[33] These questions have remained under discussion on different occasions. They re-emerge whenever the validity of a constitutional amendment is challenged. For instance, the validity of the 14th, 17th, 18th and the 21st amendments were challenged.

[34] *Al-Jehad Trust v. Federation of Pakistan*, PLD 1997 SC 84, per Saeed-uz-Zaman Siddiqi, at 236 (ZZ).

[35] Antonin Scalia (born 1936) is an associate justice of the US Supreme Court. He was appointed to the Supreme Court in 1986, and thus currently the longest serving justice. He was a Professor of Law at the University of Virginia from 1967–1971, and a Professor of Law at the University of Chicago from 1977–1982. He is described as the intellectual anchor for the **originalist** and **textualist** position in the Court.

[36] Stephen G. Breyer (born 1938) is an associate justice of the US Supreme Court. He was appointed to the Supreme Court in 1990. He was an Assistant Professor, Professor of Law, and Lecturer at Harvard Law School, 1967–1994, a Professor at the Harvard University Kennedy School of Government, 1977–1980. He is known for his **pragmatic** approach to constitutional law, which is in contrast to the theory of Justice Scalia, the above cited.

[37] Dortzbach Kenneth, "Legislative History: The Philosophies of Justices Scalia and Breyer and the Use of Legislative History by the Wisconsin State Courts", 80 Marq. L. Rev. 161 (1996).

[38] Professor of Law, University of Minnesota Law School.

[39] Eskridge and Philip P. Frickey, “*Statutory Interpretation as Practical Reasoning*”, 42 Stan. L. Rev. 1989-1990, p. 321-22.

[40] Antonin Scalia, “Looking It Up: Dictionaries and Statutory Interpretation”, 107 Harvard Law Review 1437, 1439 (1994).

[41] Thomas E. Baker, “Constitutional Theory in a Nutshell”, 13 Wm. & Mary Bill Rts. J. 57 (2004), available at <http://scholarship.law.wm.edu/wmborj/vol13/iss1/3>, last visited 26.10.2015

[42] Earl T. Crawford, *Crawford’s Statutory Construction: interpretation of laws*, (Pakistan Law House,1998).

[43] Ibid., at p. iii.

[44] Arun Sagar, “Constitutional Interpretation in Federations and its Impact on the Federal Balance”, *Perspectives on Federalism*, Vol. 3, issue 1, 2011.

[45] Choudhry, Sujit, “Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation” (1999). Indiana Law Journal, Vol. 74, No. 3, p. 819, 1999. Available at <http://ssrn.com/abstract=1624070> (14.10.2015)

[46] The Hoover institution, Stanford University, (Nov. 1991).

[47] Member of the Court of Appeal of England & Wales.

[48] Frank B. Cross is the Herbert D. Kelleher Centennial Professor of Business Law at the University of Texas.

[49] Cheryl Boudreau, Mathew D. McCubbins, and Daniel B. Rodriguez, “Statutory Interpretation and the Intentional (Ist) Stance”, 38 Loy. LA. L. Rv. 2131 (2005).

[50] Ralph S. Tyler, Jr. is a Professor of Constitutional Law at Harvard Law School.

[51] By the term, *Textualist*, the author refers to the literalist, i.e. those who support that the judges should the textual meaning in the process of interpretation, whereas by the word, *purposivism*, he means those who support the purpose-based interpretation.

[52] Richard H. Fallon, Jr, “Three Symmetries between Textualist and Purposivism Theories of Statutory Interpretation—and the Irreducible Roles of Values and Judgment within Both”, *Cornell Law Review*, (2014) Vol. 99:685, at 688.

[53] Associate Professor of Law, Georgetown University Law Center.

[54] William Eskridge, *The Practice of Dynamic Statutory Interpretation*, (Delhi: Universal Law Publishing Co., 2000).

[55] Francis Bennon, *Bennion on Statute Law*, 3rded.,(Longman, 1990). The book is available at <http://www.francisbennion.com/1990/002.htm>, (last accessed 15.01.15).

[56] Universal Law Publishing Co., New Delhi, 2008.

[57] Available at <<http://books.google.com.pk/books?id=Y5jP-vWkTpkC&pg=PA125&dq=interpretation+of++Statutes;+india&hl=en&sa=X&ei=29PtUafgLsSwAe3kIDwBA&ved=0CEIQ6AEwBDgK#v=onepage&q=interpretation%20of%20%20Statutes%3B%20india&f=false>> (09.03.2013).

[58] Tahir Mehmood, Dr., *A.S. Bindra's Interpretation of Statute*, 7th ed., Allahabad: Law Book Company, 1984).

[59] S. M. Zafar, *Understanding Statutes*, (Lahore: PLD Publishers, 1997).

[60] Ibid, at pp.27-32.

[61] M. Mehmood, *Interpretation of Statutes: With General Clauses Acts*, (Lahore: Pakistan Law Times Publications, 2010).

[62] Faculty member Punjab Judicial Academy, Lahore.

[63] Available at:

<[http://www.pja.gov.pk/system/files/Statute Interpretation.pdf](http://www.pja.gov.pk/system/files/Statute%20Interpretation.pdf)>(06.03.2013).