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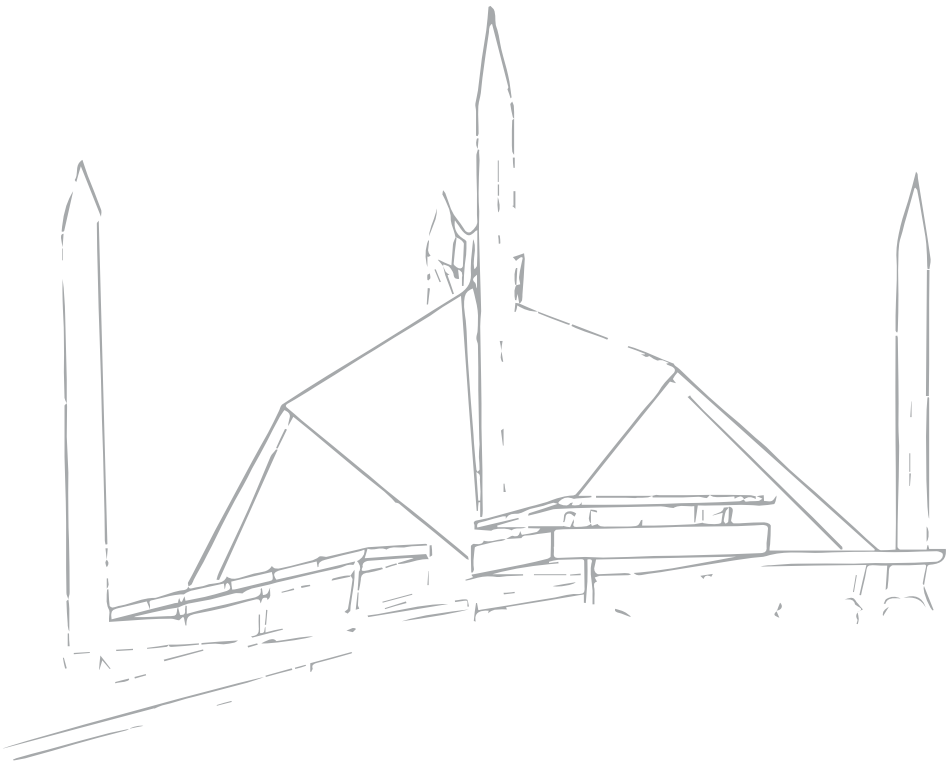

Constitutional Interpretation: An Appreciation of Living Constitutionalism from Pakistan's Perspective

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Abstract:

This article analyses 'living constitutionalism approach' to interpretation of constitution. In doing so, first the two traditional forms of constitutionalism i.e. political and legal constitutionalism are reviewed. Thereafter, the discussion on the theoretical regime of interpretation is reflected so as to determine the appropriate approach of Constitutional Interpretation. Moreover, the emerging trends in the courts of Pakistan in favour of 'living constitutionalism' and progressive and dynamic interpretation of the constitution are also analyzed. Finally, the discussion as aforesaid is leading to the conclusion that dynamic interpretation is the most appropriate mechanism for realization of the purposes of living Constitutionalism.

Key Words: Constitutionalism, Political Constitutionalism, Legal Constitutionalism, Originalism, Living Constitutionalism, Dynamic Interpretation.

1. Introduction:

Generally Constitutionalism may be defined as a 'belief in constitutional government'.[1] The idea of Constitutionalism is associated with the doctrine of 'Limited Government' advocated by John Locke and utilized by the founders of American Constitution.[2] The restraint on the government justified on the premise that the government should and must not be unbridled in which case it shall lead to tyranny or authoritarian rule. Such

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[1] Bazezew, Maru, "Constitutionalism", *Mizan Law Review*, Vol. 3, No. 2, September 2009, pp. 358-369.

[2] Wil, Waluchow, "Constitutionalism", *The Stanford Encyclopedia of Philosophy*, (Edward N. Zalta Edn.: Spring 2018), Available at: (https://plato.stanford.edu/archives/spr2018/entries/constitutionalism/).

restraint is only possible through entrenchment of the basic rules in the *texted document* known as constitution supplied with hard processes of bringing amendments in the same.[3] In other words the actions of the politicians (legislators) concerned with the making of laws and the state officials concerned with the implementation of laws shall be assessed in the light of the pre-fixed rules. Most importantly, the legislature shall and must be checked in its law-making powers and be controlled if deviates from the supreme rules upon which the community is founded.[4] Hence, it requires an independent and neutral judiciary to undertake the above mentioned tasks. The Court is conceived as a guardian of the constitution in which capacity it checks the government in its actions in the touch stone of the constitution. While doing so the Court is required to interpret the provisions of the constitution frequently. There exist several approaches as to how the Court should interpret the law. These approaches may be categorized mainly into two models namely, Agency Model and Partnership Model of Interpretation. In constitutional arena these approaches are advocated more or less by originalists and living constitutionalists respectively.

In this work I will first analyze the two traditional approaches to constitutionalism i.e. Legal and Political Constitutionalism by comparing the two and making out an argument that the Political Constitutionalists have been failed to present a coherent system, hence, legal constitutionalism, supporting entrenchment of the constitutional rules, is still the foundational belief in constitutionalism. However, the discussion on the most contentious topic of judicial review is out of the preview of this work. Presumably taking Legal Constitutionalism as the basic tradition, I will then analyze the regime of interpretation generally and of constitutional provisions particularly. In doing so, a comparison shall be undertaken between the originalists and the living constitutionalists so as to identify the appropriate approach in interpreting constitutional provisions.

[3] Zabokrytskyy, Ihor, "Rule of Law and Constitutionalism: Modern Approaches", *The Advanced Science Journal*, Vol. 2015, Issue 6, pp. 49-51.

[4] Barber, N.W. "Why Entrenchment?", *I.CON* 14, (2016), pp. 325-350

2. Constitutionalism and its two traditions

Constitution, among the constitutional writers, may be defined in two senses distinct from each other. In the first sense, it means 'the nature of a country in reference to its political conditions', whereas, in the second sense, constitution means 'a law that concerns itself with the establishment and exercise of political rule. In other words, constitution in the first sense means the attitude, conditions and character of the political life of a country while in the second sense it refers to a set of rules under which the political rule is to be realized in a country. To put it in a simpler way, it may be said that the constitution in the first sense is descriptive and in second sense is normative.[5] The school who believes on the definition of the constitution in the first sense is called as Political Constitutionalism and the school which refers to the second sense of the constitution is called as Legal Constitutionalism. The doctrine of Constitutionalism states that 'the government's authority is determined by a body of laws or constitution. Constitutionalism has been understood by some scholars as limited government[6] which sometimes depicts a *minimal or less government*. However, this is not a generally pursued conception. The more general conception lies in the belief that 'constitutionalism seeks to prevent arbitrary government.' Arbitrariness means the willful government by the ruler at his discretion and to pursue his own interests instead of the interests of the persons being ruled.[7] Constitution is also understood in a

[5] Laughlin, Martin, *'The Political Constitution Revisited',* LSE Working Paper, 18/2017, Law Dept. London School of Economics and Political Science, Available on:

http://eprints.lse.ac.uk/87572/1/Loughlin_Political%20Constitution_Author.pdf.

[6] This commonly existing sense of the constitutionalism is called the Negative Constitutionalism which deals with 'limited government' idea. Whereas, Barber and other have popularized a new interpretation of constitutionalism known as 'Positive Constitutionalism' which implies that constitutionalism means that state have competent institutions to apply the rule of the government effectively and the said institutions are responsible to people in their working. *See* Barber, N.W., *The Principles of Constitutionalism,* (Oxford: 2018), Oxford University Press, pp. 2-9.

[7] *See* for example, Bellamy, Richard, "Constitutionalism" (September 13, 2010). *International Encyclopedia of Political Science*, B. Badie, D. Berg-Schlosser and L. Morlino, eds., IPSA/Sage, Forthcoming. Available at SSRN: https://ssrn.com/abstract=1676321.

more abstract sense as 'an overarching legal framework that determines relationships of the different levels of law and of the distribution of powers among their institutions.[8]Constitutionalism is a by-product of the Roman idea of Mixed Government and after passing through the currents of Montesquieu's doctrine of *Separation of Powers* which was mechanically blended in the US Constitution, has reached to a matured level in the present day world.[9]

With the passage of time the Political Constitutionalism split into two groups[10] which I may, for the purpose of this article, name as Hard and Soft Political Constitutionalism. This split is based on the approach of the writers to the nature of the entrenchment[11] of the principles upon which the political life of a country revolves. The writers who believe in Hard Political Constitutionalism are antagonist of any sort of entrenchment of political behavior, whereas, the authors of the Soft Political Constitutionalism, though agree to some extent, on the entrenchment of the political attitude of a country, however, they refuse the role of the Court in modifying the constitutional rules through the medium of judicial review. In other words, Soft Political Constitutionalists are agreed with the stance of the Legal Constitutionalists, in opposition to Hard Political Constitutionalists in entrenchment of the rules of political life, whereas, it is agreed with the claim of the Hard Political Constitutionalists that the Court should not be permitted to modify the constitutional principles through judicial review, a stance opposed to the stand of Legal Constitutionalists. The Legal

[8] Adams, Maurice et. al (editors), *Constitutionalism and the Rule of Law*'. (New York: Cambridge University Press, 2017), p. 3

[9] *See* for example, Richard Bellamy.

[10] Political Constitutionalists have already been divided into 'radical' and 'moderate' factions. This divide is peculiar to the approaches of the concerned theorists as to the acceptability of the role of 'judicial review'. The writers who negates the concept of 'judicial review' altogether are grouped in radical school and the authors who subscribe to the view that 'judicial review' may only be justifiable in cases of administrative law but not in constitutional matters are grouped in 'moderate school' of Political Constitutionalism. *See* for example; Craig, Paul Philip, *Political Constitutionalism and Judicial Review,* (November, 2014), Available at: http://ssrn.com/abstract=1503505.

[11] Generally 'entrenchment' may be described as 'making it difficult for a rule to be altered or changed. *See* for example; N.W. Barber *infra* n. 4.

Constitutionalists believe that not only the rules of the political life of a country be entrenched but also the Court being the guardian of the constitution shall guard the constitutional provisions so entrenched from all sort of encroachment by the legislature. In other words, the Legal Constitutionalists believe both in the entrenchment of the constitutional provisions as well as the use of Judicial Review by the Court.

Legal Constitutionalism is founded on two related claims. The first one is that a society is capable of reaching upon the substantive outcomes[12] that should tend to secure the democratic ideals of equality among the citizens. The second claim upon which Legal Positivism is based is that the judicial processes are more reliable to identify these outcomes than the democratic process.[13]

The central idea in constitutional debates is the *role of law in democracy*. In the backdrop of the debates on constitution, the challenge posed by the Political Constitutionalism to the traditional approach i.e. Legal Constitutionalism has carved out the way for further constitutional discussions. Though the origin of the Political Constitutionalism is not new, however, it was passionately articulated in the recent times by Richard Bellamy in the introduction of his book.[14] He says that:

> The legal constitutionalist's attempts to constrain democracy undercut the political constitutionalism of democracy itself, jeopardizing the legitimacy and efficacy of law and the courts along the way. For a pure legal constitutionalism, that sees itself as superior to and independent of democracy, rests on questionable normative and empirical assumptions—both about itself and the democratic processes it seeks to frame and partially supplant. It overlooks the true basis of constitutional

[12] These 'substantive outcome' means the concept of human rights, which has grown into the conception of fundamental law.

[13] Bellamy, Richard, *Political Constitutionalism: A Republican Defense of the Constitutionality of Democracy,* (New York: Cambridge University Press, 2007), p. 3.

[14] Minkinen, Panu, "Political Constitutionalism verses Political Constitutional Theory: Law, Power and Politics" *I•CON* (2013), Vol. 11 No. 3, 585–610

> government in the democratic political constitutionalism it denigrates and unwittingly undermines.[15]

Though some factions of Political Constitutionalism negate the concretization of the political behavior of a country, however, majority of the constitutionalists including Soft Political Constitutionalists do agree on entrenchment. The dominant argument of the Legal Constitutionalists as to the entrenchment of the political behavior is, as aforesaid, safeguard the populace from the abuse of power of the rulers. This premise brings with certain other principles of constitutionalism like the concept of 'fundamental rights', 'rule of law', 'separation of power', 'independent and impartial judiciary' and on the top of all the 'judicial review'.[16] The entrenched, right-focused and judicially oriented (that is to be pleaded in a court of law) constitution is necessary for the purpose of ensuring 'stable and accountable government, obliging, legislatures and executives to operate according to the established rules and procedures'.[17]

Now as the common theory and the global practice exhibits the standpoint of Legal Constitutionalism, hence, it is necessary to understand the ways in which the entrenched principles or the constitutional principles be interpreted.

3. Originalism and Living Constitutionalism: The Interpretive Beliefs

It is pertinent to mention that the principles upon which the political life of a country is founded must be upheld by all the stakeholders involved in the business of the political rule of that country. In case of any doubt or dispute as to a matter related to political rule, there must be existing an independent authority in shape of Court so as to settle the doubt or dispute permanently and avoid chaos.[18] However, it may not be possible unless the

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[15] Quoted by Ibid.

[16] See for a deeper understanding of these enumerated principles, Richard Bellamy.

[17] Bellamy, Richard, "Constitutionalism" (September 13, 2010). *International Encyclopedia of Political Science*, B. Badie, D. Berg-Schlosser and L. Morlino, eds., IPSA/Sage, Forthcoming, Available at: SSRN: https://ssrn.com/abstract=1676321

[18] *See* for example, Martin Laughlin.

constitutional principles be expressly stated and entrenched. When the Court is faced with the question of elucidating the meaning of the language of the constitution; whether abstract or normative, there would be two possibilities. First, the language may plain and clear and may not require innovation on the part of the Court, therefore, in such a situation, the Court shall have no other option but to give that plain and clear meaning to the language. For instance, when a constitutional provision provides that: "The Senate shall consist of one hundred and four members….."[19] Here the Court cannot do innovation and increase the membership of the Senate from one hundred and four to one hundred and five. The problem occurs when the language of the constitution is not so plain or clear. For instance, the Constitution of Islamic Republic of Pakistan while enumerating the qualification for membership of Majlis-e-Shoora (Parliament) provides that:

> "A person shall not be qualified to be elected or chosen as a member of Majlis-e-Shoora Parliament unless- … sagacious, righteous, non-profligate, honest or amen."[20]

Here the words, 'sagacious', 'righteous', 'non-profligate', 'honest' and 'amen', are all either ambiguous or vague and do not have a clear and unequivocal meanings. Moreover, even the best legislators while authoring a constitutional text can only articulate some of the future events and will only vaguely anticipate others or even will not foresee them all together. However, sometimes even if they may foresee a future event they may choose not to address it. Therefore, to tackle these types of problems which pose questions on the legality of the actions, officials would try to explain the concrete constitutional provisions in light of abstract language. But when they reach at a position where they cannot afford further delay, they would appeal for formally amending the text.[21] It is pertinent that the rate of the amendments would have been numerous in every written constitution if the

[19] Article 59 (1) of the Constitution of Islamic Republic of Pakistan.

[20] Article 62 (1) (f) of the Constitution of Islamic Republic of Pakistan.

[21] Reference may be made to Pakistan, where only in a period of 47 years (from 1973 when the Constitution was adopted) twenty five amendments have been brought so far. In India one hundred and four amendments have brought in the Constitution of 1948.

constitutional entrenchment; resulted in the rigidity, did not exist. Hence, the Court, if faced to interpret the like provisions, would be required to carry a laborious task to elucidate the meaning of the constitutional language if suffered from any of the above mentioned or the like problems.[22] The constitutional theory suggests that every country, within its constitutional framework and social, economic and political conditions, has adopted different course specific to its conditions in determining the meanings as aforesaid. However, there are two contradictory traditions in constitutionalism that serve to answer the question that how should the Court interpret an equivocal constitutional language, the 'originalism' and the 'living constitutionalism'.

Originalism is an approach to constitutional interpretation which preaches that valid course for a Court is, while interpreting the constitutional language, to discover the original meaning of the text.[23] Originalism may be defined as "judicial interpretation of the Constitution which aims to follow closely the original intentions of its drafters."[24] However, the 'intentionalism' approach has become obsolete long ago. But originalism did not disappear and has adopted other shapes which may be categorized as 'Academic Originalism', 'Judicial Originalism' and 'Political Originalism.[25] Most popular of the new form is 'public meaning' approach' which says that the Court shall assign the meaning to the constitutional language as was understood generally by the public at the time the constitutional text was

[22] Raz, Joseph, On the Authority and Interpretation of Constitutions: Some Preliminaries, appeared in Alexander Larry's edn., *Constitutionalism: Philosophical Foundations*, (Cambridge: Cambridge University Press, 1998), p. 159.

[23] Murphy, Walter, *Constitutional Interpretation as Constitutional Creation,* The 1999-2000, Harry Eckstein Lecture, UC Irvin, CDS Working Papers. Available at: *https://escholarship.org/uc/item/850266jm*

[24] Oxford Dictionary 2004.

[25] 'Academic Originalism' has following types: 'Intentionalism', 'Public Meaning', 'Original Methods', 'Original Law', 'Judicial originalsim' is also known as 'Eclictic Originalism' and 'Political Originalism' is known as 'Rhetorical Originalism'. *See,* for example, Lawrence B. Solum, *Supra* n. 26.

framed.[26] Scalia agreeing[27] with Chief Justice Marshal of US on the textual interpretation quotes a statement of Justice Marshal:

> "Where the mind labours to discover the design of the legislature, it seizes everything from which aid can be derived; and in such case the little claims a degree of notice, and will have its due share of consideration."

To Scalia, Chief Justice Marshal was supporting and not deviating from the original understanding of the text. Therefore, Chief Justice Marshal and Scalia along with others are the supporters of textual interpretation.[28]

All forms of the originalism are agreed upon the idea of 'fixed and restrained'. They believe that the meanings of all the words included in the constitution have been fixed at the time of the framing of the constitution and therefore, a deviation is restrained or innovation is prohibited and the Court is only required while interpreting the constitutional language to discover those meanings.[29]

However, originalism is suffered from several deficiencies. First, they believe that the authors of the constitution had shared or contributed *a single unified intent* but as put by Kenneth A. Shepsle, on the intentionalism in matters of ordinary legislation which is also correct in constitutional interpretation, 'Congress is a 'They' not an 'It"[30], which means that the framers or founders of the constitution is not a single body, rather it is composed of several individuals. To this end Forrest McDonald argued that:

> "[I]t is meaningless to say that the Framers intended this or the Framers intended that: their positions were diverse and, in many particulars, incompatible. Some had firm, well-rounded plans,

[26] Solum, Lawrence B., *Originalism verses Living Constitutionalism: Conceptual Structure of the Great Debate,* Northwestern University Law Review, Vol. 113, No. 6, (2019), pp. 1243-1296.

[27] He writes "This book takes the same position" (i.e. of Chief Justice Marshal), Scalia, Antonio, Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts,* (US: 2012), Thomson/West, p. xxii.

[28] Ibid., pp. xxi-xxii

[29] Lawrence B. Solum.

[30] Shepsle, Kenneth A., "Congress is a "They" not an "It": Legislative intent as Oxymoron", *International Review of Law and Economics*, Vol. 12, Issue 2, June 1992, pp. 239-256.

> some had strong convictions on only a few points, some had self-contradictory ideas, some were guided only by vague ideals. Some of their differences were subject to compromise; some were not."[31]

Second, the originalists are of the view that the intention may be gathered from the historical documents say for example records of the parliamentary debates. However, it may also not be possible as *those records, simultaneously voluminous and incomplete, are replete with contradictory claims, and the founders themselves often changed their minds about what had been in their minds*.[32] The most vital challenge for the originalists lies in perplexity that how can the present generation be controlled by the intent of the previous generation, different in social, political and economic conditions particularly when the founders failed to make their intention clear even to the generation they were living in.[33]

Joseph Raz has rightly opined that instead of listing interpretive methods and techniques, one should start with the questions that: 'Why is interpretation so central to constitutional adjudication?' One answer to the question he provides is that "it (constitution) is in need of reform, adjustment and development in order to remove shortcomings it always had or shortcomings that emerged as the government or the society that it governs changed over time."[34] This answer best illustrates the doctrine of living constitutionalism. Living constitutionalism is the interpretive method which preaches that the constitutional language be interpreted in a manner so as to advance, reform and supply the lacuna in the constitution and to fill the gap between the successive generations. Hence, this method is focused mainly on the *idea of constitutional change*.[35] The living constitutionalism, like originalism, has several forms for instance, 'constitutional pluralism', 'moral readings', 'common law constitutionalism', 'popular constitutionalism' etc. However, the central idea shared by the forms is that the court should interpret the constitutional language in a manner that may advance or cause a healthy change

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[31] Qoated by Walter Murphy.
[32] Ibid.
[33] *Ibid, See* also Joseph Raz, p. 159
[34] Ibid., p. 177
[35] Lawrence B. Solum.

in the constitutional management of the country. Change is important because the entrenchment makes the constitution rigid which cannot be easily amended. However, over time the circumstances or the 'conditions' of a society changes. Hence, it is mandatory for the compatibility and adjustability, that the constitution be responsive to the new circumstances. This is possible, as already mentioned elsewhere through two modes. First, either the constitution be amended, which is not an easy task, as the majority of the world constitutions exhibits lengthy and technical procedure for its amendment. Second, the constitution is to be kept alive by the decisions of the courts in a manner to invent or discover new meanings of the constitution which are more responsive to prevailing circumstances instead of lingering on to the meanings either conceived by the fathers of the old generation or the public meaning perceived by the society of the old days. The significance of the living constitutionalism approach has finely been presented by Strauss in his metaphor of a tree. The tree depicted in his work grows with all its branches and roots in a coherent and coordinated and organic way. He suggest that tree of the constitution shall grow in all directions and with full might. If the growth stops the tree would die and constitution would destroy.[36]

The courts in Pakistan also subscribe to the view of living constitutionalism. Justice Syed Mansoor Ali Shah in his dissenting note in *Khurshid Soap and Chemical Industries (PVT.) LTD.*, while explaining the 'living tree doctrine' in the context of Pakistan says:

> "The 'living tree' doctrine allows the Constitution to change and evolve over time while acknowledging its original intentions…… Our courts have repeatedly underlined that our Constitution is a living document and encouraged its progressive interpretation." [37]

To him progressive interpretation[38] is preserving the *vitality of the constitution.* He is of the belief that if the constitution has not been

[36] Balkin, Jack M., "The Roots of Living Constitutionalism", *Boston University Law Review,* Vol. 92, (2012), p. 1130-1160.

[37] PLD 2020 Supreme Court 641, Dissenting Note of Justice Syed Mansoor Ali Shah, 81.

[38] 'Progressive interpretation' is another name of 'dynamic interpretation' developed in the metaphor of the 'living tree' which may

interpreted progressively, *it would be frozen in time and become more obsolete than useful.*[39]

Justice Syed Mansoor Ali Shah in the *Jurists Foundation through Chairman*, while discussing the interpretation of fundamental rights, maintains that the *fundamental rights in a living constitution are to be liberally interpreted so that they continue to embolden freedom, equality, tolerance and social justice.*[40] He is of belief that *'…vibrancy and vitality is the hallmark of a living constitution in a democracy.'*[41] For Justice Sayyed Mazhar Ali Akbar Naqvi of Lahore High Court *constitution is a living document because it cannot be restrained to the past rather it has life to unfold the future for its implementation.*[42] To the courts in Pakistan, constitution being a living and organic document, shall not be interpreted narrowly or restrictively[43] rather shall be interpreted dynamically[44] and *with an eye to the future.*[45]

4. Conclusion

It may be concluded that a faction of the Political Constitutionalists including Griffit provide an abstractive solution for constitutionalism. However, the abstract phenomenon is impossible to either be interpreted or implemented correctly in the society, whereas, Legal Constitutionalism provides a normative approach towards constitutionalism. For the obvious reasons, normative system is more feasible and ready to be interpreted and applied coupled with the fact it may not easily culminate in corruption or mal-practices. Hence, the concretized system may not only provide a safeguard against the abuses of the power by the executive and legislative organs of the state but also against

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be advocates the idea that the *'the language of the Constitution is applied to contemporary conditions and ideas without regard for the question whether the framers would have contemplated such an application.' See* Goldsworthy, Jeffrey, (edn.), *Interpreting Constitutions: A Comparative Study,* (New York: Oxford University Press, 2006), p. 87.

[39] Ibid.

[40] PLD 2020 Supreme Court 1, 7

[41] PLD 2020 Supreme Court 59913.

[42] PLD 2020 Supreme Court Lahore 285.

[43] 2017 SCMR 1344 (Supreme Court of Pakistan), 37.

[44] 2019 PLC (C.S.) 238, Karachi High Court, 9.

[45] 2015 SCMR 1739, 41.

judicial biases and prejudices. Moreover, it also protects the constitution and advances the cause of justice and overcomes the corrupt practices, owing to the reason that the tradition of Legal Constitutionalism protects the system of justice from absurdity by requiring all the concerned including judges to act in accordance with *pre-fixed* rules. Further, for the purpose of growth and to be responsive to the changed circumstances the only feasible method of interpretation is the living constitutionalism model of interpreting constitution which requires that the court should adopt dynamic interpretation approach while interpreting Constitution, particularly the fundamental rights. This model is gaining much support both in judiciary and academia. They are of the belief that law must correspond to the changed circumstances so as for adaptability of the law, it is necessary that court shall interpret the law by assigning the meanings to the words and phrases in accordance with the prevailing circumstances instead of adhering to the legislative intent of the past.

Both the living constitutionalism and dynamic interpretation approach suggests that constitution and laws be interpreted in accordance with the prevailing circumstances which shall ultimately result in supplementing the gaps in the constitution and law.