



Piercing the Veil of Ouster Clauses: Exploring Judicial Review's Reach and Impact

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ABSTRACT

An ouster clause is a specific provision designed to exclude the courts' jurisdiction over certain matters. It aims to prevent courts from reviewing decisions made by public functionaries. As the roles and functions of public functionaries expand in a welfare state, the implementation and interpretation of ouster clauses become increasingly intricate. For an ouster clause to be effective, the intention to exclude judicial oversight must be either explicitly stated or clearly implied within the statute. Yet, the idea of a total exclusion from judicial review, especially concerning administrative actions, is widely considered unattainable. Superior courts consistently assert that absolute ouster is an alien concept in jurisprudence. In contemporary times, review of numerous judicial precedents shows that they have developed their own principles to address ouster clauses, and though they exhibit variations, but they present similar reasonings in their objective of governing, limiting, or permitting the use of ouster clauses. In this research, an attempt will be made to delve into an examination and present an overview of the principles established by the courts in England, India, and those expounded by the superior courts in Pakistan regarding ouster clauses.



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1. Introduction of Ouster Clause

An "ouster clause is a clause that seeks to exclude the jurisdiction of the courts" (*Ouster clause legal definition of ouster clause. n.d.*). It is a statutory provision aimed at limiting or preventing a court's authority to scrutinize decisions made by public functionaries. It serves as a mechanism to exclude judicial oversight of administrative actions (*Ouster Clause - The Is a Provision in a Statute That Tries to a Ability to Review Decisions of a - Studocu, n.d.*). In various legal systems, the ouster clause goes by multiple names, including the finality clause, exclusion clause, conclusive clause, and privative clause, among others. Regardless of the terminology, all these clauses share a common purpose: to ensure the finality of administrative actions (khan, 2016).

The notion of fully excluding administrative actions from judicial review remains untenable. Nonetheless, parliaments globally are sometimes inclined to adopt more stringent measures to curtail judicial review, utilizing direct exclusion clauses. Such measures might involve overt efforts to restrict court jurisdiction with phrases like 'the decision shall be deemed final'; 'no court of law may question the authority's decision.' Additionally, there exist varied strategies that attempt to constrain the scope of review, either by content or timeframe. For instance, the bases for review might be narrowed, or a time constraint might

be imposed for initiating a challenge (Stott, 1997). Consequently, the notion of an absolute ouster finds no footing in a contemporary welfare state. This reality is reinforced by the principle of check & balance, a role performed by the judicial system.

'Finality clauses' are occasionally integrated into statutes to signify that a specific decision of public functionary is beyond the reach of any court challenge, there exists a strong jurisprudential history that indicates benches do not recognize such provisions as perpetual barriers to review judicially. A prime illustration of this stance is found in the case of (*R v Medical Appeal Tribunal*, 1957). In this case, section 36(3) of the National Insurance (Industrial Injuries) Act 1946, provides that 'any decision of a claim or question... shall be final'. The petitioner sought the certiorari and Lord Denning held that, even if these words might be sufficient to oust an appeal, they did not deter the process of judicial review. He affirmed, "It's a well-established principle that the certiorari remedy can only be overridden by statute through the most clear and explicit phrasing". In his view, a mere declaration like 'shall be final' was not adequate to meet this criterion (Leyland & Anthony, 2016). In another legal instance, Lord Denning observed that the term 'final' lacks sufficiency. It merely signifies 'non-appealable,' excluding its connotation as an obstacle to seeking certiorari. This classification renders the decision's finality applicable to the facts, not necessarily to the law. The avenue of certiorari remains available for cases of exceeding jurisdiction or errors of law present in the record (*Application*, 1957).

In this context, it is noted by Prof. Wade and Forsyth that though representatives for government departments might contend that a certain act or function demands absolute ouster on their discretion but such a lacks constitutional backing. Unchecked discretion is undesirable in a system built on the rule of law. This principle can be restated as: any power is susceptible to misuse, and the capability to curb such is the judicial review (Wade, 2009a). Yet, the extent to which decisions rendered by governmental and administrative bodies should fall under judicial review remains a topic of substantial debate. The utilization of ouster clauses, for instance, might be seen as a valuable tool to fend off a potentially conservative-leaning judiciary (Leyland & Anthony, 2016). Professor Griffith, advocating the 'green light' perspective, acknowledges and endorses the necessity for specialized bodies to serve as adjudicators in specific realms of administration (Griffith & Street, 1952).

2. Finality of Administrative Action

The expansion of authorities and obligations among public functionaries demands conclusiveness in their actions and results. However, as their roles become more intricate within a welfare state, the implementation of the ouster clause takes on heightened complexity. Historically, administrative and judicial functions were intricately linked, although subsequent changes led to their divergence due to welfare state concept. Today, public functionaries are exercising substantial impact over decisions concerning rights of citizens, assuming roles akin to judicial authorities—quasi judicial function. This shift stimuli discussions on finality of administrative actions, within the realm of welfare state.

The transition from a laissez-faire ideology to a welfare state philosophy has aided the emergence of law that deals with administration in the administrative State (Beale, 2013). There is always a need for a law to ensure that the authorities remain within their lawful limitations, thereby safeguarding citizens against potential abuse; that law is the Administrative Law (Wade, 2009b). Administrative law is a field of public law that deals with the organization, methods, authorities, responsibilities, rights, and liabilities of government entities involved in policy implementation (Bradley & Ewing, 2007). As the administrative division of government evolved, so did the creation of new administrative functionaries. This surge in administrative functionaries and the increase in their powers are endowed with extensive responsibilities. Currently, they are handling various tasks such as legislation, enforcement, administration, and adjudication. They are involved in citizens' everyday lives, and as the scope of their authority widened, there arose a pressing need to establish a framework of rules to oversee and regulate these functions, besides with a growing emphasis on the finality of their administrative decisions (Nastasi, Pressman, & Swaigen, 2020). The power of courts to review the decisions of public functionaries is a legal concept that was created by courts on the basis of principles of common law. Its purpose is to ensure that acts

or functions of public functionaries adhere to the law, though such decisions do not necessarily constitute a legally actionable wrong (PHILLIPS, 1994).

Furthermore, just as a Parliament has the autonomous and independent capacity to delegate legislative, executive, and judicial responsibilities to subordinate bodies, it too has the authority to protect the use of these powers from judicial intrusion. It is achievable through the following means: (a) through introducing a specific clause within the legislation, explicitly aimed at excluding or 'ousting' the jurisdiction intervention of courts; (b) through formulating the conferred authorities in sufficiently broad manners that minimize the scope for challenging the exercise of these powers; (c) By establishing a statutory recourse to address alleged instances of power or duty abuse as stipulated in the enabling Act (Carroll, 2003). Nonetheless, the concern of misuse and abuse of these powers remains pronounced, often urged by the use of Ouster Clause Jaiswal (2021), and the veil of the ouster clause still remains penetrable (Tollefson, 1931). The reason is that pursuit of 'absolute discretion' in decision-making aims to enhance administrative efficiency, however, the extensive latitude in absolute discretion poses a risk to the supremacy of law (Leggat, 2017).

3. Judicial Review of Ouster Clause

Mostly, ouster clauses around the world have these wordings to be given finality to the administrative actions: "Shall not be questioned in any legal proceedings whatsoever", "shall not be subject to appeal" "shall not be liable to be questioned in any court". Today, various jurisdictions have established their own sets of rules and principles to deal with ouster clause, and though these principles might differ but they often share core similarities in their intent to regulate, restrict, or allow the ouster clause. In this research, we will explore and provide an overview of the principles articulated by the courts in England, India, and those elucidated by the higher courts in Pakistan in reviewing and interpreting Ouster Clauses.

3.1. English Courts Review of Ouster Clause

The English courts have consistently upheld the power of review over ouster clauses, since early cases. This can be understood in the words of Holt CJ in *Groenwelt v Burnell* that no court is immune from the King's Bench's oversight. This means, any lower court's proceedings can be brought to the King's Bench to be reviewed, to ensure that they are acting within their authority (Tribunal). The supervisory role of the King or Queen's Bench in England was kept in the Judicature Act 1873, through section 16, which established the High Court, and was later followed in the Senior Courts Act 1981, by section 19 of it.

This approach can be further gauged from a series of case laws since the 18th century in this regard. In *Comrs*, a legal action was brought to a Quarter Sessions ruling on an appeal in opposition to a rate that Commissioners imposed, but the statute provides a complete bar. However, Lord Denman CJ stated that even though an ouster clause may purport to take away the right of certiorari (a type of judicial review), the court's general supervisory role over proceedings allows it to ensure that they are conducted in accordance with the law; even if a statute attempts to prevent this, it cannot be avoided. The statute that created the ouster clause cannot override the court's inherent right and duty to ensure justice (*Comrs*). Farwell LJ, in the case of *Shoreditch Assessment Committee*, justified the principle of judicial review over ouster clauses by arguing that the High Court is an essential part of any system of courts with limited jurisdiction. This is due to the importance of having a high court to define and enforce the limitations of lesser courts' jurisdiction. Creating a court with restricted jurisdiction and then giving it infinite ability to establish its own jurisdiction would be inconsistent. This court would be monocratic rather than limited. It also makes no difference whether the lower court's conclusion about its peculiar jurisdiction is based on law or fact (Iyer, 2002).

Professor Paul Craig outlines three stages in the expansion of the High Court's inherent authority to review decisions (Craig, 2012). According to him, the English courts have gradually expanded their power to review decisions. In the early years of judicial review, courts used two main doctrines to determine which errors in administrative proceedings were subject to review: 1) the collateral fact doctrine, 2) the theory of limited review. But in the latter part of the 20th century, the courts adopted a more expansive approach to judicial review, rejecting the jurisdictional/non-jurisdictional divide and holding that all faults in law

are reviewable. In addition, in recent years, courts have signaled a willingness to vary the test for review in certain contexts, especially with regards of tribunal rulings. This suggests that the courts are moving towards an extra nuanced approach for reviewing judicially (Craig, 2016).

Reasoning behind is that the law court should be the eventual and last arbiter, and that administrative bodies should not be able to override the courts' decisions about their own jurisdiction. Craig (2018) argues in an article that the separation and the balance of powers doctrines mean that public functionaries must not remain able to determine limits of their own powers. He cites a concise statement of Nolan LJ, who said that the appropriate constitutional correlation between the public functionaries and courts of law is as follows: 1) the courts of law will give due regards to all decisions and determinations of the public functionaries within their lawful sphere, 2) the public functionaries will give due reverence to all decrees and orders of the courts of law (Craig, 2018).

Nevertheless, another important case is pertinent to be discussed here. Mrs. Smith attempted to brought a legal action against the legitimacy of the compulsory purchase order (CPO) that had been made by the local authority to acquire 8.5 acres of her property. Subsequent to a local inquiry, the CPO was confirmed through the Minister in 1948. The law that established the system for issuing CPOs had an expulsion provision that barred the legal actions against CPO. CPO was question on the ground of malafide and bad faith. The court, however, refused to hear her case, believing that it was obligated to adopt and apply Parliament's will as clearly stated in the expulsion clause. The court reasoned that because an order would not show any bad faith on its face; bad faith could only be revealed through procedures. Nonetheless, the court decided that such an action had to be made in line with the legislative mechanism, and that it could not have been made otherwise if it had not been made as per law (RDC, 1956).

Conversely, in Anisminic case, a Foreign Compensation Commission had made a decision that based on a legal error. The Commission had a statutory ouster clause that purported to prevent the courts from reviewing its decisions, but the court held that the ouster clause ineffective, in this case, because of that legal error. Since there was no time limit on when a legal challenge to the Commission's verdicts could be launched, the ouster clause was absolute. The court was reluctant to accept that an administrative power could be entirely beyond the purview of judicial scrutiny and ruled that the law's provisions did not hinder the court from determining whether an alleged decision of the Commission was an annulment on the grounds that the Commission had erroneously interpreted a provision defining their jurisdiction (Craig, 2018).

In other words, the court ruled that the ouster provision did not stop it from appraising decisions of the Commission that were based on errors of law. This is because the court considered such decisions to be nullities, meaning that they had no legal effect. Lord Reid argued that although ouster provisions have an extended history, they have never been deemed to preserve a nullity in a court decision. He stated that if the legislation's drafter or Parliament were hoping to add a new type of expulsion clause that would exclude inquiries into whether a decision was void, they would have made it clear in their writings.

After that, in a different case, the Court of Appeal upheld the Anisminic ruling and determined that the British Nationality Act of 1981's ouster provision did not bar the judge from reconsidering the Secretary of State's decision to deny the applicant British nationality. In other words, the court determined that the ouster clause was inadequate because it was powerless to stop the court from reconsidering judgments that were based on legal mistakes. The court further ruled that the expulsion provision should be construed strictly since it was not plain and unequivocal (R v Secretary of State for the Home Department, 1997). Thereafter, in the case of Boddington v British Transport Commission, court clarified that the Anisminic decision had recognized a sole class of legal errors, that render a determination ultra vires (beyond the legal power of the decision-maker). He stated that there is no dissimilarity amongst obvious and hidden legal errors, and that all ultra vires acts or subordinate legislation are unlawful simpliciter (Commission, 1999).

Likewise, in the case of South East Asia Fire Bricks case, the claimants wanted to have a verdict of the Malaysian Industrial Court overturned on the basis of legal errors. The Malaysian Industrial Relations Act, 1967, contained an ouster clause that stated that verdicts of the court were final and conclusive (Bhd, 1981). The Privy Council ruled that the exclusion clause was effective to prevent the courts from reviewing decisions of that court for legal errors that were within the law. However, the Privy Council also observed that such provision could not prevent the courts from appraising decisions of the court for errors of law that were outside the court's jurisdiction (Stott, 1997).

Then finally, In the case of Privacy International, the UK Supreme Court ruled that the exclusion provision in the Regulation of Investigatory Powers Act, 2000, that purports to exclude any challenge to decisions of the Investigatory Powers Tribunal (IPT), does not avert appraisal of a verdict based on legal errors. Additionally, it was noted that there is a compelling argument for concluding that the rule of law obliges the courts to determine whether or not to enforce a provision set forth by Parliament that appears to preclude the possibility of judicial review by the High Court. In other words, the Supreme Court determined that the exclusionary provision cannot stop courts from examining IPT findings for legal flaws (Elliott & Young, 2019).

3.2. Indian Courts Review of Ouster Clause

One of the earliest cases on constitutional ouster in India was (G.P.Mitter, 1971). In this case, apex court considered constitutionality of Article 217(3) of the Indian Constitution, which provides that the President's decision on judge's age is final. The court held that even though Article 217(3) states that the President's decision is final, it still can assess the determination on limited scope: if the President acted in bad faith or if the decision is based on an error of law (G.P.Mitter, 1971).

Allahabad High Court's judgment to declare her election illegal due to irregularities. In the interim, the Parliament approved the 39th Constitutional Amendment, which created a new Article 392A and amended the Constitution to state that the election of the Prime Minister and Speaker cannot be contested in any national court but must be brought before a committee established by the Parliament. The Supreme Court affirmed Indira Gandhi's victory in the election but ruled that the 39th Amendment was invalid since it went against the fundamental principles of the Constitution. To put it another way, the Supreme Court ruled that ouster clauses cannot bar the court from appraising determinations that are made in contravention of the Constitution's fundamental principles. A collection of fundamental principles make up the Constitution's basic structure framework and it cannot be altered by Parliament, not even through constitutional amendments (Priyadarshi, 1975). Likewise, when a proclaimed emergency comes into question before the apex court of India, it ruled that judicial review is not barred to examine whether the constitutional machinery has failed or not, and whether the conditions necessary to enforce Article 356 are not available. It also held that although the "satisfaction of the President" is not questionable, the material or conditions upon which this satisfaction is based are questionable (Rajasthan, 1977). In *Birewar* (2021), the Court ruled that the emergency under Article 356 is answerable to judicial review. It observed that if the proclamation is found to be mala fide (made in bad faith), the court will strike it down. The court also held that the proclamation is not entirely protected from review and that it should be struck down (Birewar, 2021).

Moreover, in a recent case of *Mukherjee* (2013), the apex Court again observed that the ouster of jurisdiction of civil courts under various enactments cannot take away the jurisdiction of the higher. These jurisdictions are granted to the courts through the Constitution and cannot be eliminated by law without amending the Constitution (Mukherjee, 2013).

In India, Courts do not believe that a finality clause is a magic spell that can prevent judicial review. The finality of a decision by law depends on whether it is consistent with the law itself. The principle functional in the courts of law is that even if a finality clause exists, the court can still review to check if the function or act of the public functionary under challenge is beyond the authorities granted to that authority or not (Zachillhu, 1992). Indian courts have repeatedly upheld their power to review statutory ouster clauses. One of the leading cases on this issue is *Dhulabhai's* case, in which the apex court laid down the following conditions for defining whether a statutory ouster clause is valid: 1) where a law grants

conclusiveness to the commands of a special tribunal, the civic courts' jurisdiction will be excepted if the law provides suitable remedies that are equivalent to those that would normally be available in a civil suit. However, this does not apply if the tribunal has not complied with the requirements of the relevant Act or has not followed the essential principles of the procedure; 2) where a law expressly hinders the dominion of the courts, the court may consider its scheme to determine whether the remedies provided are adequate or sufficient, but this is not decisive in determining whether the civil courts have jurisdiction; 3) the court will look at the remedies offered and the Act's structure to assess the legislature's intention where there is no express exclusion of the courts' jurisdiction. The outcome of this investigation could be crucial. In this case, the court will assess whether the statute establishes a unique right or obligation and stipulates how it will be decided, as well as whether it stipulates that any disputes relating to that right or obligation must be decided by the tribunal. Additionally, the court will take into account whether the statute offers remedies that are typically connected to lawsuits in civil courts (Pradesh, 1968).

However, the Supreme Court of India explored whether a statutory ouster clause may bar a court from revisiting a tax authority's judgment that was founded on a legal error in the *Firm of Illuri Subbayya* case. The court ruled that a statutory expulsion clause cannot bar a court from reviewing a tax authority's judgment if the decision is issued in violation of the fundamental rules of judicial procedure or is based on a violation of the statute's core provisions. The reason, according to the court, is that such rulings are invalid and illegitimate, and that it is the courts' fundamental responsibility to enforce the rule of law and defend individual rights. And it was made clear that only decisions based on a breach of a statute's core provisions or issued in violation of the basic rules of judicial procedure can be challenged in court (Verma & Rawat).

Courts presume that they have jurisdiction. A person who claims that a court does not have jurisdiction must prove it. Even if a statute tries to bar a civil court from hearing a case, the court can still exercise its jurisdiction if the statutory authority or tribunal acted without jurisdiction (Bairwa, 2009). Even when public functionaries have been given the authority to make final decisions, courts are hesitant to give up their ability to review those decisions. This is so that courts can fulfill their core duty to enforce the law and safeguard people's rights. In *Dwarka Prasad Agarwal's* case, the court determined that except where a statute expressly or unambiguously provides otherwise, civil courts have the authority to hear all civil issues under Section 9 of the Code of Civil Procedure. It was observed that a provision that seeks to bar the authority of civil courts ought to be strictly construed. In other words, courts will not easily give up their power to hear cases. And it was also stated that court will normally lean in favor of an interpretation that upholds the authority of civil courts. The burden to prove lies with the one who claims the civil court does not have jurisdiction (Agarwala, 2003).

The principles of statutory ouster clauses have been summarized in the *Mafatlal Industries* case. The court ruled that an exclusionary clause in a law cannot prevent courts from reviewing a decision of a tribunal if the decision is a nullity. A verdict is a nullity if: the court lacked jurisdiction at the commencement of the inquiry, for example, if the statute under which the court was acting was *ultra vires*, or if the tribunal was not properly constituted; the court lacked jurisdiction during the progression of the enquiry, for example, if the court incorrectly determined a jurisdictional query, or if it is unsuccessful to follow the essential principles of legal procedure; the court dishonored the essential provisions of a law under which it was acting; it acted in bad faith; granted a relief when it had no power to grant (India, 1997).

3.3. Pakistani Courts Review of Ouster Clause

The apex courts of Pakistan agree with the above referred views of Indian and English courts on the ouster of jurisdiction at the constitutional level. And one thing is clear that courts have consistently interpreted ouster clauses strictly. In the case of *Muala Dad Khan*, the court held that the ouster of jurisdiction cannot be implied or inferred from vaguely worded and imprecise expressions on the basis of a priori reasoning. The court also ruled that an exclusion clause is a law excluding the jurisdiction of courts and must be strictly construed. An order suffering from legal infirmity, particularly in the domain of competency, cannot enjoy the protection of the statute from challenge (Khan, 1975).

The Courts presume that they have jurisdiction, and any law that tries to bar access to the courts must be narrowly interpreted. This is because the courts are created to protect people from oppression and to redress their grievances (Khan, 1989). However, if an ouster clause is clear and unambiguous, the courts will enforce it. This means that the courts will not review decisions of public bodies if the ouster clause clearly states that the courts do not have jurisdiction to do so. Therefore, a claim that the High Court's authority has been ousted regarding any matter cannot be taken lightly. There must be a clear, definite, and positive provision ousting the jurisdiction, or the courts will retain their jurisdiction (Farooq, 1991). In other words, the ouster of jurisdiction must be express, and can never be implied (Additional Collector-II Sales Tax, 2003).

Besides even though ouster clauses are strictly interpreted but they are not absolute. The courts have stated that they will always review decisions of public bodies that were: coram-non-judice; bad faith; without jurisdiction. Therefore, in Pir Sabir Shah case, it was ruled that the superior courts still have authority to reappraise decisions of public bodies, even if those decisions are protected by a constitutional ouster clause. This jurisdiction exists for three categories of cases: 1) Coram non judice: this means that the decision was made by a court that lacked jurisdiction; 2) Without jurisdiction: this means that the court did not have the legal authority to make the decision; 3) Malafide: this means that the decision was made in bad faith, or with improper motives. The court held that these three grounds are so fundamental that they cannot be ousted by any statute (Pakistan, 1994). Hence, in another case, it was ruled that the court takes jurisdiction to review decisions of public bodies, even if those decisions are protected by an ouster clause and are founded on the pleasure of a public functionaries. It can review the decision to determine if the essential ingredients for the exercise of powers existed when decision was made. Simply saying, the court held that an exclusion provision cannot stop the court from reviewing a verdict of a public service if the decision was made without the necessary legal basis (Laghari, 1999).

Furthermore, in the case of Javaid Hashmi, the validity of elections was questioned. Article 225, of Pakistani constitution, provides that the validity of an election cannot be challenged in any court except before the election tribunal, but the court held that even though statutory authorities are given certain powers, they are still expected to perform inside the boundaries of the law. If a public functionary acts outside of its legal authority, or refuses to function as required by law, its decisions can be challenged in court and declared to be invalid. The court also held that orders passed by election authorities are not immune from challenge in court, even if they contain an ouster clause (Hashmi, 1989).

Also, in another case the court the court has explained that a constitutional provision that bars courts from reviewing a particular act or omission can only prevent courts from reviewing acts that are not legally or factually flawed. However, if the act is shown to be without jurisdiction, made by a court that does not have the power to hear the case, or made in bad faith, then the superior courts have jurisdiction to review the act, even if the constitution contains an ouster clause (Junejo, 1998).

In the case of Zia-ur-Rahman, while interpreting Article 281, which states that all orders, either martial law, and regulations passed through the Chief Martial Law Administrator are barred from courts reviewing authority. It was ruled that even though Article 281 contains an ouster clause, the court still has authority to appraise the validity of any act done in exercise of such powers if the act was coram non judice (made by a court that does not have jurisdiction), without jurisdiction, or tainted with malafide (made in bad faith) (Zia-ur-Rahman, 1973).

It is not always that courts interfere. In a case where a fellow of the Pakistani forces was convicted through a Field General Court Martial, it was ruled that it would not intervene with the decision of the army court. The court reasoned that the requester had acknowledged the authority of army courts, and that the guilty verdict was neither made in bad faith, nor by a court that did not have jurisdiction, nor without jurisdiction (Ex. Lt. Col, 2001). Yet in a case involving the Pakistan Air Force Act of 1953, which contains an ouster clause preventing other courts from reviewing decisions of the Air Force, the Court held that the provision which gives the Court the power to issue constitutional writs, must be strictly construed. The court

reasoned that if an act of the Air Force is an abuse of authority or is contaminated with malice, Article 199(3) will not prevent the High Court from reviewing the decision (Khan, 1989).

And in Shahid Orakzai case, when emergency was challenged, the Supreme Court of Pakistan ruled that it takes jurisdiction to review the President's decision to proclaim an emergency, even though the Constitution contains an ouster clause. The court reasoned that it can review the decision to ensure that the President complied with the prerequisites for exercising the power to proclaim an emergency. If the court finds that the President did not comply with the prerequisites, then the declaration of emergency will be without jurisdiction and the court can interfere (Orakzai, 1999).

In a case where a petitioner challenged presidential directives under Article 209 of the Constitution, which contains an ouster clause, the apex court held that the ouster clause does not protect acts that are without jurisdiction, made in bad faith, or coram non judge. Mere inclusion of an ouster clause in the Constitution or in any other law does not prevent a court from examining the ouster clause and determining the extent of the claimed immunity. The court further held that no amount of immunity can protect acts that are made in bad faith, without jurisdiction, or coram non judge (Zia, Aziz, Chaudhry, & ur Rehman, 2020).

Similarly, the courts have the same view of statutory ouster as they do of constitutional ouster. Statutory ouster clauses, which exclude the authority of general courts, should be interpreted stringently. Unless the case clearly falls within the letter and spirit of the ouster clause, it should not be given effect. To be immune from challenge before a civil court, the authority or tribunal must be validly constituted under the relevant statute, the order or action must not be made in bad faith, and the act must be inside the authority of the authority or court. If any of these conditions are not met, the order or act of the public functionary or tribunal can be challenged before a civil court (Coop, 1997). In simple words, the ouster clause in a statute only applies when the authorities constituted under the statute act within the limits of the statute. If the authorities step outside of their authority, the protection available to orders passed by a tribunal of special jurisdiction is no longer available, and a court of general jurisdiction can review the case.

That is why in the Yousaf Ali case the court decided that even if the parliament deems an act as final, it accepts that the authority issuing it has the power to do so. In this case an order was given under section 13-B of the Pakistan Rehabilitation Ordinance, 1948, which was considered final. However, this order was later contested. The court held that any order exceeding that authority's powers cannot be seen as final, as it would be legally considered void and non-existent (Zia, 1958).

When the court's jurisdiction was challenged under section 10 of The Public Conduct (Scrutiny) Ordinance 1959, asserting that orders from the president, under Article 6 (5) (b) of the Laws (continuance in force) Order, 1958, couldn't be interrogated in any law court, the court declared: to negate a court's jurisdiction by a statute that dictates an authority's orders cannot be questioned, three conditions must be met: 1) The individual being pursued should fall under the authority's purview; 2) The legal grounds for the action should be valid; and 3) The order should be one that would have been permissible under the law, and once these requirements are met, the ousting is complete.. Only when these conditions are met is the court's jurisdiction effectively ousted (Zafar-ul-Ahsan, 1960). And, last but not least, when the authority of civil court was challenged due to restrictions under the Frontier Crimes Regulations, 1901, and the decree from the deputy commissioner was deemed final, the court held that an act done in bad faith inherently lacks jurisdiction. No legislative body anticipates the misuse of power when granting authority. A bad-faith order is essentially a betrayal and a statute fraud (Basit, 2012).

4. Conclusion

Despite the fact that ouster clauses are undoubtedly crucial, it is already established law that the exclusion of civil court jurisdiction must either be expressly stated or clearly indicated; it cannot simply be inferred. Even in circumstances where the act's requirements have not been followed or the statutory tribunal has not acted in accordance with the fundamental rules of judicial procedure, civil courts have the authority to investigate the

situation (Haji, 1963). However, court's role is not legislation but interpretation. In Muhammad Ismail's case, the esteemed Supreme Court of Pakistan deliberated and outlined the rules for interpreting laws, especially when a legislation's wording seems to oust the courts' jurisdiction. In making its point, the top court cited the works of Maxwell and Craies and held that when interpreting a law, law court generally assume that the legislature did not aim to introduce a radical or sudden change in policy, unless the statute clearly and explicitly states otherwise. However, there is also a solid belief that the parliament does not make mistakes. If a mistake is found in a statute, it is up to the legislature to correct it, not the courts. The courts' role in interpreting a law is to determine the true intent of the parliament, but this intent must be derived from the words used in the statute itself. If the words of the law are clear and definite, then the courts must give them their ordinary grammatical meaning, even if the consequences of that interpretation are undesirable (Ismail, 1969).

Courts are generally reluctant to assume that a statute intends to oust their jurisdiction. Any law that denies access to the courts must be narrowly construed, because the courts are the forum created by the people to obtain relief from oppression and redress for the infringement of their rights. However, if an ouster clause is clear and unambiguous, the courts will give effect to it. However, this does not mean that the law court will not be able to appraisal executive acts in any circumstances. The courts will still have jurisdiction to review executive acts if the ouster clause is not clear and unambiguous, or if the nature of the jurisdiction sought to be ousted or the nature and extent of the ouster itself is such that the courts should retain jurisdiction. The principle is that the courts will take a strict approach to interpreting ouster clauses, and will be reluctant to find that an ouster clause is valid unless it is strong and unambiguous that the parliament envisioned to oust the jurisdiction of the courts in all circumstances (Khan, 1989). The legislature can eliminate the authority of a court, but there is a presumption against doing so. Any law or statutory provision that denies access to the courts must be interpreted strictly. An ouster clause must either be plainly stated or evidently implied, and it should not be easily inferred. The language used by the legislature must show a clear and unambiguous intention to eliminate the authority of the courts. If the language of an ouster clause is so clear and unambiguous that there is no doubt that the legislature intended to expel the authority of the courts in all circumstances, then the ouster clause will be given effect (COMMISSION, 2022).

It is worth highlighting, based on the previously mentioned examination of case laws, that while most of the other ouster clauses contained in the Constitution or statutes have been judicially pierced and read down, however, this does not represent an absolute legal principle. It is now well acknowledged that when a statute grants a right and establishes a comprehensive mechanism for its enforcement, there is seldom a need to resort to invoking fundamental rights and constitutional jurisdiction of higher courts (MAJEED, 2023). For example, the High Court's jurisdiction would be unequivocally prohibited under Article 212 of the Constitution of the Islamic Republic of Pakistan, due to the specific recourse is available for addressing the grievances, irrespective of the context in which the contested order might have been issued, whether due to bad faith, lack of jurisdiction, or overstepping jurisdiction (Ltd., 2008).

However, the apex court of Pakistan, in a recent instance, has summarized the essence of this principle, stating that without question, a clause eliminating the jurisdiction of a civil court must be interpreted rigorously. Nevertheless, established rights should not be undermined, and an ouster clause cannot strip anyone of their property or right. Moreover, such a clause should not be used as a tool to perpetrate injustice or hardship. Nonetheless, this does not imply that the ouster clause lacks legal significance. A crucial aspect in evaluating the extent of jurisdiction exclusion is checking if there is an alternative redress available for those potentially affected (KHAN, 2023).

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Hafiz Muhammad Azeem: Help in the Introduction and conceptualization and conclusion and finalize the draft.

Muhammad Shahid Sultan: Write the introduction and literature review section and complete the article.

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REFERENCES

- Additional Collector-II Sales Tax, L. v. M. A. S. M. L. (2003). *Additional Collector-II Sales Tax, Lahore v Messrs Abdullah Sugar Mills Ltd, 2003 SCMR 1026*. Retrieved from
- Agarwala, D. P. A. v. R. C. (2003). *Dwarka Prasad Agarwal v Ramesh Chandra Agarwala, AIR 2003 SC 2696*. Retrieved from
- Application, R. G. s. (1957). *Re Gilmore's Application, (1957) 1 All ER 796*. Retrieved from
- Bairwa, R. S. v. B. M. (2009). *Rajasthan SRTC v Bal Mukund Bairwa, (2009) 4 SCC 299*. Retrieved from
- Basit, A. (2012). *Federation of Pakistan v Abdul Basit, 2012 SCMR 1229*. Retrieved from
- Beale, A. (2013). *Essential Constitutional Law: Routledge-Cavendish*.
- Bhd, S. E. A. F. B. S. (1981). *South East Asia Fire Bricks Sdn Bhd v Non-Metallic Mineral Products Manufacturing Employees Union, [1981] AC 363*. Retrieved from
- Birewar, A. (2021). Case Analysis: SR Bommai v. Union of India (AIR 1994 SC 1918). *Indian JL & Legal Rsch., 3, 1*.
- Bradley, A. W., & Ewing, K. D. (2007). *Constitutional and administrative law (Vol. 1): Pearson Education*.
- Carroll, A. (2003). *Constitutional and administrative law: Pearson Education*.
- COMMISSION, B. M. A. D. C. v. P. M. (2022). *BAHAWALPUR MEDICAL AND DENTAL COLLEGE v PAKISTAN MEDICAL COMMISSION through Secretary and others, 2022 C L C 775*. Retrieved from
- Commission, B. v. B. T. (1999). *Boddington v British Transport Commission, 2 AC 143*. Retrieved from
- Comrs, R. v. C. R v *Cheltenham Comrs, (1841) 1 QB 467, 113 ER 1211*. Retrieved from
- Coop, A. (1997). *Abbasia Coop. Bank v Muhammad Ghauss, PLD 1997 SC 3*. Retrieved from
- Craig, P. (2012). *EU administrative law: Oxford University Press, USA*.
- Craig, P. P. (2016). The Legitimacy of US Administrative Law and the Foundations of English Administrative Law: Setting the Historical Record Straight. doi:<https://doi.org/10.2139/ssrn.2802784>
- Craig, R. (2018). Ouster clauses, separation of powers and the intention of Parliament: from anismic to privacy international. *Public law., 4, 570-584*.
- Elliott, M., & Young, A. L. (2019). Privacy International in the Supreme Court: Jurisdiction, the rule of law and parliamentary sovereignty. *The Cambridge Law Journal, 78(3), 490-496*. doi:<https://doi.org/10.1017/S0008197319000813>
- Ex. Lt. Col, A. A. (2001). *Ex. Lt. Col, Anwar Aziz v Federation of Pakistan, PLD 2001 SC 549*. Retrieved from
- Farooq, A. B. o. P. v. K. (1991). *Allied Bank of Pakistan v Khalid Farooq, 1991 SCMR 599*. Retrieved from
- G.P.Mitter, U. (1971). *Union of India v G.P.Mitter, AIR 1971 SC 1093*. Retrieved from
- Griffith, J. A. G., & Street, H. (1952). *Principles of administrative law: Pitman*.
- Haji, K. A. a. a. v. M. Y. (1963). *Keramat Ali and another v Muhammad Yunus Haji and others, PLD 1963 SC 191*. Retrieved from
- Hashmi, J. (1989). *Election Commission of Pakistan v Javaid Hashmi and others, PLD 1989 SC 396*. Retrieved from
- India, M. I. L. v. U. O. (1997). *Mafatlal Industries Ltd v Union Of India, (1997) 5 SCC 536*. Retrieved from
- Ismail, M. (1969). *Muhammad Ismail and others v the State, PLD 1969 SC 241*. Retrieved from
- Iyer, V. (2002). The importance of judicial review. *The Journal of the Malaysian Bar, 31(4), 60-67*.
- Jaiswal, M. (2021). JURISDICTION OF COURT Vis. A Vis. EXCLUSION CLAUSE: A BIRDS EYE'S VIEWS. *PalArch's Journal of Archaeology of Egypt/Egyptology, 18(08), 4108-4117*.
- Junejo, M. R. T. v. J. M. A. (1998). *Muhammad Rafique Tarrar v Justice Mukhtar Ahmed Junejo/Acting Chief Election Commission of Pakistan, PLD 1998 Lahore 461*. Retrieved from

- Khan, F. o. P. v. G. M. (1989). *Federation of Pakistan v Ghulam Mustafa Khar*, PLD 1989 SC 26. Retrieved from
- khan, H. (2016). *Principles of Administrative Law (Second Edition)*. Oxford University Press. Retrieved from Oxford University Press.:
- Khan, M. D. (1975). *Muala Dad Khan v West Pakistan Bar Council*, PLD 1975 SC 469. Retrieved from
- KHAN, S. Z. (2023). *SHAH ZAMAN KHAN v GOVERNMENT OF KHYBER PAKHTUNKHWA*, PLD 2023 SC 340. Retrieved from
- Laghari, S. F. A. K. (1999). *Sardar Farooq Ahmad Khan Laghari v Federation of Pakistan*, PLD 1999 SC 57. Retrieved from
- Leggat, A. (2017). Absolute discretion and the rule of law: Uneasy bedfellows. *Victoria University of Wellington Legal Research Paper, Student/Alumni Paper(5)*. doi:<https://doi.org/10.2139/ssrn.2972392>
- Leyland, P., & Anthony, G. (2016). *Textbook on administrative law*: Oxford University Press.
- Ltd., S. A. A. a. o. v. P. T. (2008). *Syed Arshad Ali and others v Pakistan Telecommunication Company Ltd. And others*, 2008 SCMR 314. Retrieved from
- MAJEED, M. A. (2023). *Mst. AMNA MAJEED v GOVERNMENT OF THE PUNJAB through Secretary Primary and Secondary Healthcare Punjab, Lahore, 2023 PLC (C.S.) 620*. Retrieved from
- Mukherjee, P. A. S. v. P. (2013). *Purno Agitok Sangma v Pranab Mukherjee*, (2013) 2 SCC 239. Retrieved from
- Nastasi, L., Pressman, D., & Swaigen, J. (2020). *Administrative Law: principles and advocacy. Public law*.
- Orakzai, S. (1999). *Shahid Orakzai v President of Pakistan*, 1999 SCMR 1598. Retrieved from
- Ouster Clause - The Is a Provision in a Statute That Tries to a Ability to Review Decisions of a - Studocu, n.d.* Retrieved from
- Ouster clause legal definition of ouster clause. n.d. ()*. Retrieved from
- Pakistan, P. S. S. v. F. o. (1994). *Pir Sabir Shah v Federation of Pakistan*, PLD 1994 SC 738. Retrieved from
- PHILLIPS, K. N. (1994). *Mercury Energy Ltd v Electricity Corporation of New Zealand Ltd* (1994) 1 WLR 521. Privy Council. Lords Templeman, Goff, Mustill, Slynn and Woolf. *Te Mata Koi: Auckland University Law Review*, 7(3), 750-754.
- Pradesh, D. v. S. o. M. (1968). *Dhulabhai v State of Madhya Pradesh*, 1968 (3) SCR 662. Retrieved from
- Priyadarshi, D. (1975). Case Study: Smt. Indira Nehru Gandhi vs. Shri Raj Narain and Anr. on 7 November, 1975. *Indira Nehru Gandhi vs. Shri Raj Narain and Anr. on, 7*. doi:<https://doi.org/10.2139/ssrn.2146120>
- R v Medical Appeal Tribunal, e. p. G. (1957). *R v Medical Appeal Tribunal, ex parte Gilmore*, [1957] 1 QB 574 (Queens Bench). Retrieved from
- R v Secretary of State for the Home Department, e. p. F., n.d. (1997). *R v Secretary of State for the Home Department, ex parte Fayed*, 1 All ER 228. Retrieved from
- Rajasthan, S. o. (1977). *State of Rajasthan v Union of India*, AIR 1977 SC 1361. Retrieved from
- RDC, S. v. E. E. (1956). *Smith v East Elloe RDC*, [1956] AC 736. Retrieved from
- Stott, D. (1997). *Principles of administrative law*: Routledge-Cavendish.
- Tollefson, A. M. (1931). Administrative Finality. *Michigan Law Review*, 29(7), 839-849. doi:<https://doi.org/10.2307/1281232>
- Tribunal, P. LEGISLATION PURPORTING TO OUST THE HIGH COURT'S JURISDICTION: PRIVACY INTERNATIONAL.
- Verma, R., & Rawat, S. S. S. swatantra thesis may 2015.
- Wade, W., & Forsyth, C. (2009b). *Wade, W., & Forsyth, C. (2009b). Administrative Law (10th edition)*. Oxford University Press. Retrieved from Oxford University Press.:
- Wade, W., & Forsyth, C. . (2009a). *Wade, W., & Forsyth, C. (2009a). Administrative Law (10th edition)*. Oxford University Press. Retrieved from
- Zachillhu, K. H. v. (1992). *Kihoto Hollohan v Zachillhu*, 1992 SCR (1). Retrieved from
- Zafar-ul-Ahsan. (1960). *Zafar-ul-Ahsan v Republic of Pakistan*, PLD 1960 SC 113. Retrieved from
- Zia-ur-Rahman, T. S. v. (1973). *The State v Zia-ur-Rahman*, PLD 1973 SC 49. Retrieved from

Zia, M. H., Aziz, F., Chaudhry, A. M., & ur Rehman, N. (2020). SCOPE OF JUDICIAL INTERFERENCE AND TEST OF MISCONDUCT IN REFERENCES AGAINST SUPERIOR COURT JUDGES IN PAKISTAN.

Zia, Y. A. v. M. A. (1958). *Yousaf Ali v Muhammad Aslam Zia*, PLD 1958 SC (Pak) 104.
Retrieved from