

**EXECUTIVE-JUDICIARY RELATIONS: A CASE STUDY OF
CHIEF JUSTICE IFTIKHAR CHAUDHARY'S DECISIONS**

(2005-2013)



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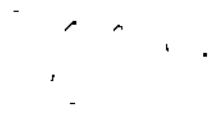
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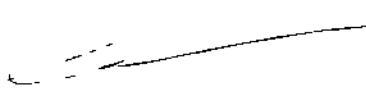

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Plagiarism Disclaimer

None of the material (except expressed) are of the thesis writer, material has been extracted from citations in foot notes and Bibliography

Dedications

To my beloved Parents

Acknowledgement

In the Name of Allah, the Beneficent, the Merciful Innumerable thanks to ALMIGHTY ALLAH, for giving me courage to accomplish the assigned task Also thankful to our Holy Prophet Muhammad (SAW) for enabling us to recognize our Lord and Creator

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Razia Wadood

List of Cases

Maulvi Tameez-ud-Din khan vs Federation 1954

State vs *Dosso Case* 1958

Asma Jilani vs Government of the Punjab Case 1972

Ahmad Tariq Rahim's case in 1990

Begum Nusrat Bhutto vs The Chief of Army Staff Case 1977

Al-Jehad Trust vs Federation of Pakistan 1997

Asad Ali vs Federation of Pakistan 1998

Federation of Pakistan vs Saifullah Khan Case 1988

Zafar Ali Shah vs General Pervez Musharraf 2000

Qazi Hussain Ahmad vs General Pervez Musharraf 2002

Watan Party vs Chief Executive of Pakistan 2003

Hussain Ahmad vs Pervez Musharaf 2004

Pakistan Lawyers Forum vs Federation of Pakistan 2005

Abstract

Since independence, Pakistan has not been enjoying the democratic process and its utilities. The political system of Pakistan was dominated by the bureaucracy and military. Every government, military or civilian, strengthened one institution (executive or judiciary) over the other for its own interest which resulted in a disruption in the smooth functioning of these institutions. History of Pakistan represents this institutional imbalance where executive and judiciary crossed their constitutional limits and tried to interpret the constitution according to their interests. This study focuses on the relationship of these state institutions and their impact on the democratic process of the country. It also focuses on how these institutions (executive and judiciary) affected each other's decisions during the tenure of Chief Justice Iftikhar Chaudhary, and how Judicial Activism affected the democratic process in Pakistan. The study concludes that Pakistan needs a balanced political system and long standing democracy that can be attained through mutual understanding, harmony and cooperation between executive and judiciary.

Chapter 1

Introduction

Since its inception Pakistan has been facing political crisis. Either it is military coup or the conflict among the organs of the state. Every government, military or civilian, has strengthened one institution of the government over the other for its own interest which has resulted in a disruption in the smooth functioning of these institutions. Pakistan's history has witnessed this institutional imbalance where executive and judiciary crossed their constitutional limits and tried to interpret the constitution according to their interests.

During colonial rule, the two institutions executive and judiciary worked in a pattern where both did not interfere in each other's matters. The relationship continued for few years after the independence of Pakistan (Kokab R. U., 2013, p. 6). However, the clash between the two organs executive and judiciary started, in 1954, constitutional assembly was dissolved by governor general Ghulam Muhammad (Mahmood, 1992, p. 3).

The president of the Constitutional Assembly of Pakistan, Moulvi Tamizuddin Khan challenged the governor general's action in Sindh High Court. The court gave decision in favor of petitioner and concluded that the constitutional assembly dissolution was nullity in law (Kokab R. U., 2013, p. 8), both the Constitutional Assembly and its President continue to exist. The appeal was brought before the Federal Court of Pakistan and the Federal Court gave decision in favor of governor general despite going in detail of the constitutionality and merits of the decision. Thus the dissolution was validated under the doctrine of necessity. The court justified the action of governor general as it was failed to frame the constitution within a reasonable time.

During Ayub Khan's rule the executive and judiciary favored one another. The strong influences of the government over the judiciary compelled the judiciary to give decisions in favor of government. The judiciary at that time was too powerless to balance the executive power which was quite evident in Dosso Case. In order to mold judicial decisions in their favors, executive used the tools like promotion and transfer, as the Justice Munir was given Ministry of Law and Parliamentary Affairs on retirement (Kokab R. U , 2013, p 32)

The suppression of judiciary continued in General Yahya Khan's time. He did not interfere in the functions of judiciary, but by presidential order, forced all the judges to submit detailed statements of their assets to the Supreme Judicial Council, as a result one judge of High Court resigned and the other was removed. Further, on General Mitha case (Mahmood, 1992, p 10), he asked two judges to apologize for the contempt of martial law.

After Yahya, Zulfikar Ali Bhutto's government changed the existing practice and introduced amendments related to the judges' transfer, that the judges should be transferable like other civil servants. He also limit put on the tenure of the Chief Justice. Beside these good practices, judiciary nevertheless remained a puppet institution in the hands of executive. Bhutto introduced sixth Amendment was to enable Justice Yaqoob Ali Khan to complete his five year term as Chief Justice of Supreme Court, which was an individual favor for a judge and deprived justice Anwar-ul-Haq to become the Chief Justice (Khan H , 2009, p. 301)

The military coup of 1977 by General Zia started intervention, directly or indirectly in judicial matters. The judiciary was too weak to stand before executive and to initiate any case against it. The real tussle started when the court accepted the petition of Nusrat Bhutto case, (Khan H , 2009, p 326) by attempting to maintain certain degree of independence. The conflict ended

when General Zia introduced Provisional Constitutional Order 1981 to subvert judiciary by gaining absolute power. The executive compelled judiciary to take fresh oath under PCO, this enabled him to get rid of the judges who could question his absolute powers and to appoint new judges as well as transfer the judges to less prestigious positions.

After the death of Zia, military dictatorship ended and civilian government came into power, but the practice of confrontation between the two institutions remained there. In order to mold judicial decisions in their favor, executive appointed their party persons as judges. There were many cases for the suppression of judiciary but the most famous was the attack on Supreme Court building on November 1997 (Kokab R. U, 2013). The reason was that the government wanted to stop Justice Sajjad Ali Shah to hear the case against executive.

The history once again repeated itself, when judiciary remained controversial as General Musharaf asked judges to take fresh oath under PCO following General Zia's legacy and those who refused to take oath were dismissed from their offices (Brass, 2010).

Executive-Judiciary relationship remained deteriorated in Musharaf tenure. The executive went into conflict with judiciary as the Chief Justice Ifikhar Chaudhary took Suo Moto actions against the missing person's case, privatization of steel mill and dual office case of Musharaf's tenure (Kokab R. U, 2013, p. 239). As a result Chief Justice was terminated by the executive in 2007 which further exacerbated the Executive-Judiciary relations. A robust Lawyer Movement followed by termination of Chief Justice resulted in a restoration of Chief Justice Ifikhar Chaudhary. (Brass, 2010, p. 178) The tussle between executive and judiciary continued during the democratic government established after the end of Musharaf's tenure.

1.2 Problem Statement

In a democratic political system most of the decisions are taken by the will of the people and for the interest of the people which requires mutual understanding, harmony and cooperation between executive and judiciary. However, constitution provides a framework in which the government and judiciary operate in their respective domains. In Pakistan, since independence these two institutions (executive and judiciary) did not work in their defined limits to establish a balanced political system. The tussle between the executive and judiciary remained throughout the history. This tussle entered into a new phase after Lawyers' Movement for the restoration of Chief Justice Iftikhar Chaudhary. Therefore, it is important to understand the relationship of state institutions in post-Lawyers' Movement. It is also imperative to study how these institutions (executive and judiciary) affected each other's decisions in the particular time period of Chief Justice Iftikhar Chaudhary, and how "Judicial Activism"¹ affected the democracy in Pakistan.

1.3 Research Questions

1. What were the main reasons behind Judicial Activism?
2. What impact Iftikhar Chaudhary's decisions left on Executive-Judiciary relations?
3. How did the decision on Steel Mill's case affect the relationship between parliament and judiciary?
4. How did the clash between the two institutions affect democracy in Pakistan?

¹Judicial activism: When Supreme Court and other judges creatively interpret the texts of the Constitution and the laws in order to serve the judges' own visions regarding the needs of contemporary society (Accessed from :<http://definitions.uslegal.com/j/judicial-activism> Accessed on November 5, 2014)

1.4 Objectives of the Study

- To highlight the impact of judicial activism on the political system of Pakistan
- To analyze the reasons behind judicial activism
- To investigate the impacts of Lawyers' Movement on Executive-Judiciary relations
- To understand the nature of Executive-Judiciary relationship under Chief Justice Ifikhar Chaudhary

1.5 Significance

Executive-Judiciary clash in Pakistan has always remained a source of concern. These institutions do not work in their respective domains and try to subvert each other which are a major obstacle to establish rule of law in the country. This study is a good piece of knowledge in form of research to understand the relationship between institutions in Pakistan. Findings of this research also provide a better understanding of the rule of law for academicians and practitioners. It would also be helpful to understand how the interaction between institutions played an important role in creating a stable political environment in the country.

1.6 Methodology

The study uses qualitative methods. The nature of research is descriptive and explanatory. The research is based on both primary and secondary sources. Primary sources like interviews, reports, media coverage through interviews and official statements of the stakeholders', the secondary sources like books, articles, magazines, journals, and newspapers is used. Electronic sources such as TV, radio, and internet will also be utilized as an important source for data collection and analysis.

1.7 Literature Review

The main focus of the research is the impact of Justice Ifikhar Chaudhary's decisions on Executive-Judiciary relations and how this judicial activism affected democratic system in Pakistan. Tasneem Kausar (2012) discussed judicial system of Pakistan during the 2007 Lawyers' Movement and gave a historical overview of Supreme Court. She is of the view that Supreme Court played a very prominent role in restoration of democracy in the country. Chief Justice Ifikhar Chudhary decisions helped the court to establish its own identity, secure its legitimacy, win its independence and transformed the single regime court to people's court.

She further elaborated political and judicial empowerment of the Chaudhary's Court. She divided empowerment of the Chaudhary Court into two phases, first was the Chaudhary's relation with Musharaf's authoritarian regime and the second his relation with the democratic government of peoples party. The successful emergence from both the phases enhances the power of Supreme Court.

She also discussed the challenges to the Chaudhary Court's empowerment, these challenges were not only from the other organs of the state but also facing multiple inner stresses from its judicial legacy. She has highlighted the trust deficit between the court and government as well as the court relations with the parliament, according to her the relationship was not different from that of the executive. She concluded by suggesting that the democratic government should learn from the success achieved by Chaudhary's Court and should likewise respond to the interests of the common Pakistan (Kausor, 2012).

The study of Dilawar Mahmood, if not directly related to finding the reasons of judicial activism by analyzing the decisions of Justice Ifikhar Chaudhary and its impact on Executive-Judiciary relations. It has elaborated the judiciary and politics of Pakistan from a historical prospective,

which gave a deeper understanding of the issues facing the country since independence. He discussed that Pakistan, during its 45 years of existence, faced six Martial Laws: first was anti-Ahmediya agitation in 1953, second was imposed by Ayub Khan in 1958, third was in 1969 by General Agha Muhammad Yahya Khan to dispose of Ayub Khan, fourth was in 1971 by Zulfikar Ali Bhutto who followed the inherited Martial Law Administration of Yahya Khan, fifth was by Prime Minister Bhutto under article 245 of the 1973 constitution and it was a local Martial Law imposed in large cities, sixth was in 1977 by Chief of Army Staff General Zia-ul-Haq. He concluded that a country can put up with laws that are unjust but cannot tolerate a legal system which does not give a fair trial. Nations fall, when judges are unjust, because people feel that there is nothing worth protecting (Mahmood, 1992).

Hamid Khan (2009) in his study of "Constitutional and Political History of Pakistan" described the historical overview of the political system of Pakistan. He gave a very detailed concept of state institutions and their relations with each other since independence of Pakistan. He talked about the judiciary and government of pre-Musharraf and in Musharraf's regime. In chapter 38, he discussed Musharraf's relations with the judiciary and in chapter 39, he directly focused on Long March, Murree Declaration and restoration of judiciary. He pointed out that the confrontation of judiciary in Musharraf's regime started when they asked the judiciary to take a fresh oath under PCO. The result was that those judges who refused to take oath under PCO were forced to resign. Hamid Khan further elaborated his view that those judges who were supportive of Musharraf's government get reward as an extension in retirement age. He further discussed the suspension of Justice Ifikhar Chaudhary and the treatment within the Chief Justice after leaving the army house.

The author further described that the Chief Justice was restored on 20 July 2007, when thirteen member full court benches announced its judgment accepting the petition of Chief Justice. Thus, the reaction of these events by the public and legal professions was quite unpredictable. The protests from masses and legal community started and media played a very prominent role. He also discussed the Musharaf's coup in 2007 against judiciary by proclamation of emergency and forced the judges to take fresh oath, the election of 2008, restoration of judiciary and Murree Declaration was also discussed (Khan H, 2009)

The study of Rizwan Ullah Kokab is directly relevant to the "Lawyer Movement", the reasons of emergence of Lawyers' Movement and its after impacts by analyzing various Suo Moto actions taken by Justice Iftikhar Chaudhary. Despite that, he also gave historical significance of judiciary and its place in Pakistani society and discussed the appointment, transfer and termination of service judges. He took deep insight of lawyer movement from 2007 to 2009 started on the day, when Chief Justice Iftikhar Chaudhary was sacked and it affected not only Musharaf's authoritarian regime but also the democratic set up during Zardari's era. He discussed the development of the movement, massive support of the movement and counter movement measures. In this study, he answered a question, why was movement successful?, because the movement got political support of various political parties like, PPP, PML-N etc, beside that it also got massive support and media play a very efficient role (Kokab R U, 2013)

Ghazia Aslam (2008) in his article "Judiciary in a Constitutional Democracy" focused on the role of judiciary in a democratic state and how the lawyers' movement establishes to gain constitutional democracy. She also mentions that the basic function of judiciary in a democratic state is to protect constitution, and the judiciary performs their function only when it will be impartial and independent, because the authority of judiciary is linked with constitutional

supremacy The supremacy is achieved by mind not by paper She further says that Pakistani is lucky that the movement got success, if it will not gain their objectives then the judiciary will become subservient of the other branches of the government (Aslam, 2008)

Zamir Ghumro (2007) in his article "Factors behind the Judicial Crisis" mentioned the reasons which lead to the judicial crisis in Pakistan, such as violation of constitution, postponing of elections, Supreme Court judgment on steel mills case, Gawader land scam He further said that the government uses illegal methods to retain power and considers itself as a state not an organ of state, the judiciary can only be removed by the judiciary itself (Ghumro, 2007)

Anil Kalhan (2013) in his article "Gray zone Constitutionalism and the Dilemma of Judicial Independence in Pakistan" discussed that most countries exist in a Gray Zone between democracy and authoritarian regime Recently, in Pakistan judiciary was widely lauded for its independence by challenging military regime Pakistan over several decades has been ruled, either by military or by weak civilian government In this process judiciary has played a central role in facilitating military and its affiliated interests to well-established their power The result is creating institutional imbalance that has undermined weak representative institutions The author also analyzed Lawyer's Movement, and the Supreme Court's relations with the parliament The author has concluded that the recent shift to civilian government offers long-term consolidation of democracy, constitutionalism and civilian rule (Kalhan, 2013)

Syeda Saima Shabbir in her study "Judicial Activism Shaping the Future of Pakistan" explained Judicial Activism and applied it on the case of Pakistan In her work, she discussed the background of judicial review, which came from America and British through the process of colonization She focused on the role of Federal Court later renamed by Supreme Court in the initial years of Pakistan's independence, it works as the subservient institution of the executive

and military. She also mentioned that a new dimension assumed by the judicial review in the shape of judicial activism after the restoration of judiciary in Pakistan in 2009 and its impact on democratic government of Pakistan. She concluded that the executive and legislative authorities' weaknesses and lack of willingness to ensure the rule of law in the country (Shabbir, 2013)

The author discussed the lawyers' movement to restore the Chief Justice of Pakistan. He explained his arguments, that movement was a turning point for the institution of judiciary, who was suppressed under the authoritarian rule. They also discussed that what role lawyers played for the judicial construction (Faqr, Islam, & Rizv, 2013)

Muhammad Anwar (2009) in his thesis "How Does a Single Professional Issue Become Social Movement", viewed the communicative acts in the movement discourse through argumentation, modification of legal discourse into social discourse. He discussed that the single issue was the disposition of Chief Justice in 2007 and how the legal community started movement for the restoration of judiciary. He also examined the role played by private media channels in Pakistan to make that lawyer movement a massive movement (Anwar, 2009)

Iram Khalid (2012) in her study wrote the failure of democracy in Pakistan and the reason is institutional inability to perform their functions well. The stability of political system and survival of democracy is directly dependent upon the functioning of state institution in their described limitations. She also discussed the impact of judiciary on democratic evolution (Khalid, 2013)

Haris Gazdar (2009) article "Judicial Activism vs Democratic Consolidation in Pakistan" discusses the role Chief Justice Iftikhar Chaudhary after restoration, his decisions about the judges who took oath under the Musharaf's 2007 emergency and analyzed that Supreme Court is

interested in expanding its own powers in the name of safeguarding the constitution (Gazdar 2009)

The study of Adeel Khan (2008) is related to the difficulties faced by Pakistan in 2007, which is, dismissal and reinstatement of the Supreme Court Chief Justice, the Red Mosque siege, violence in tribal areas, the imposition of emergency rule and suspension of the Constitution and the assassination Benazir Bhutto. He further elaborated the Chief Justice Judicial Activism specially on missing person's cases angered Musharraf, who viewed this action as challenging the executive authority and power (Khan A , 2008)

1.8 Chapterization

- I Introduction
- II Theoretical Framework
- III Historical Perspective of Judicial Activism
- IV Judicial Activism An overview of Executive-Judiciary Rift (2005-2013)
- V Judiciary and Executive Rift A way to democratic transition
- VI Conclusion and Recommendations' Futuristic approach

Chapter 2

Theoretical Framework

According to the theory of institutionalism, the structure and system of an institution largely influence the political process and outcome. The main focus of this theory is that the institutional nature could structure the behavior of individual towards better ends. The ancient Greek philosopher Aristotle studied political science with the systematic analysis of institutions and their impact on society. Thomas Hobbes also continued with institutional analysis and argued for the necessity of strong institutions to save mankind from its own worst instincts.

John Lock developed a more contractarian concept of public institutions and began the path toward more democratic structure. John lock was also of the view that there should be separation of power between state's institutions. John Locke distinguished between three governmental powers, the legislative, the executive and the federative (by which last he meant the control of relations with other states), the third is nowadays included in the second, and, in any case, he did not advise that it should be in separate hands. The only separation that seemed to him to matter was between the legislative and the other two powers. Locke did not even mention the judicial power, which he no doubt thought of as part of the executive (Ratnapala, 1993).

At the end of 20th century, Montesquieu introduced a new pattern for institutional analysis, which identified the need for balance in political structure and served separation of power doctrine for weakening of potential of autocratic government (Peters, 2005). Separation of powers is a trias politica model of democracy that involves the separation of political power between the three branches of government. In a system where there is a separation of powers, each branch is constrained from intervening in the area of responsibility of another branch. The

doctrine of separation of powers or checks and balances between independent and co-equal branches of government. The phrase check and balance implies that there are competing sovereigns (such as in a federal system in a political structure). According to Montesquieu writing

When the legislative and executive powers are united in the same person or in the same body of magistrates, there can be no liberty. Again there is no liberty if the judiciary power be not separated from the legislative and executive. Where it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control for the judge might have behave violence and oppression. There would be an end to everything, where the same man, or the same body, where nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the cases of individuals
(Qvorirup, 2003, p 37)

Thus there would be an end of everything, where the same institution or the same body, whether of military or civilian, to exercise those three powers: enacting laws, executing the laws and of interpreting laws. The theory of separation of powers signifies three formulations of structural classification of governmental powers:

- *"The same person should not form part of more than one of the three organs of the government. For example, ministers should not sit in the Parliament"*
- *One organ of the government should not interfere with any other organ of the government*

- *One organ of the government should not exercise the functions assigned to any other organ* " (Mahajan, 2014)

Throughout its history, Pakistan has been an executive dominated state because in the 1935 Act, the position of the Governor General (Viceroy) was unique. The Governor General had extraordinary powers of legislation and the supreme command of the army, navy and air force was vested in him. He could however, seek the advice of a council in all matters except defense, external affairs and the affairs which involved his special responsibilities. Though he could seek ministerial advice, he was not bound to act thereupon. The 1935 Act also permitted the Governor General in certain extraordinary circumstances to dismiss a sitting prime minister without the advice or consent of the council of ministers. These powers were used with impunity by many of the heads of state of Pakistan. Thus the vice regal system which Pakistan inherited at its birth from the British, was not abandoned in succeeding years (Ziring, 1997)

From 1947 to 1956, when the first constitution was promulgated, Pakistan saw four successive governors general and three prime ministers. Cabinet members were mostly selected because they were friends and cronies. This was just like in the era of absolutist monarchies. The first constitution of Pakistan promulgated in 1956 abolished the office of the governor general and transferred the same powers to the office of the president whose executive powers exceeded those of the elected prime minister. In 1958 when the first martial law was imposed in the country, the 1956 constitution was suspended and in 1962 the military government promulgated another constitution.

The 1962 constitution institutionalized the intervention of military in politics. With the promulgation of the 1962 constitution Ayub Khan lifted martial law, but while it was apparently civilian rule, all the political institutions, in fact the whole system revolved around his

personality (Ziring, 1997) The 1962 constitution was suspended and another martial law was imposed in 1969 Thus in 1973 a new constitution was promulgated which created a parliamentary form of government in the country The prime minister was the chief executive of the country and the president as the formal head of state was bound to act on the advice of the prime minister The clash over the power structure system remained throughout history of Pakistan

The separation of power in Pakistan implies that the state power is vested and exercised by the three separate institutions and the functions of these institutions are different Judges and judiciary occupy a special position in any democratic society They are part of the state within the doctrine of separation of power According to this doctrine, the legislature is supposed to make the laws, the judiciary to interpret and the executive to enforce them, for the judiciary to be able to undertake its function fairly and impartially, it requires being independent of the other two organs and independent from political pressure

The doctrine of separation of powers is based on the rationality and universal truth that the concentration of absolute power in one institution or in one person will lead to tyranny A famous historian Lord Acton also said that

"Power tends to corrupt and absolute power corrupts absolutely" (Lewis, 2000)

Therefore, the distribution of powers between the state organs is necessary to avoid chaos and instability The separation of powers concept failed in term of Pakistan, because Pakistan has been dominated by executive authorities and all the decision were taken by them weather during military or civilian rule

After independence, it was declared that the country would have a parliamentary form of government, but this notion was changed from time to time and clashes between state institutions started. They tried to strengthen their position through constitutional amendments. In 1973 constitution, 13th, 14th and 18th amendments gives more power to Prime Minister while 8th and 17th amendments shifted executive power to the president. The Ups and Downs between parliamentary and presidential form of government makes the separation of power difficult.

Pakistan faced a long time of military rule and the civilian governments was unable to prove their ability to govern decisively and honestly.

In Pakistan, the separation of power doctrine defines the separate domain of each institution, restricting each institution not to transcend its defined powers. In Pakistan the separation of power doctrine was manipulated, as each institution tried to transcend the power of other and interferer in the domain of others, which created political and social crisis in the country. Pakistan's history and is full of those incidents, these institutions exceed their power and start interference in the respective institutions. Every institution mold the constitution according to its interests. The same pattern was followed by the judiciary, when it emerged as an independent institution and created imbalance. Thus, the doctrine of separation of power remained only in theory but not in practice.

Chapter 3

Historical Perspective of Judicial Activism

In Pakistan, the executive is a much more powerful institution and has always tried to confront judiciary. Governments, both military as well as civilian always suppress judiciary by using different methods to interpret the constitution and took decisions according to their interests. The separation of power between institutions was deteriorated which ultimately created imbalance and disturb their domain of powers, which is necessary for the smooth functioning of state's machinery.

3.1 First Phase: Pre-Constitutional Era

Pakistan, after independence, adopted the Government of India Act 1935 through which the country could be run till the framing of its constitution. In British India the uppermost court for plea was High Court. In 1935 Act, three major powers were given to Federal Court which was original, appellate and advisory. Thus, three specific functions were assigned to restrict the conflict between federation and provinces, appellate was concerned for an petition to federal court against any high court judgment and under advisory jurisdiction the Federal court was allowed to give advisory opinions to the governor General (Shah A . 2008, p 23).

In this Act, the appointment of judges was made the monarch but, in Pakistan, the highest authority was Governor General. A judge could only be removed from his office after he is found guilty of misbehavior and infirmity through the report of judicial committee of privacy Council. Pakistan adopted Independence Act 1947, after independence and followed the laws as valid and gave power of amendment according to the time. The judicial setup of Pakistan was

inherited from British and the Federal Court for Pakistan was established in 1949 with a little alteration (Khan H , 2009, p 57)

The government of Pakistan passed a legislation of Privy Council Act 1950. The law eliminated the appellate jurisdiction of privy council. As a result, all the cases related to appellate were transferred to the federal court. Federal court became the highest court of appellate and advisory jurisdiction. After independence, for few years, the state institutions did not interfere in each others decisions. The conflict was started when Governor General dissolved constitutional Assembly in 1954 (Kokab R U , 2013)

The reason behind this dissolution was that he did not agree with the 3rd and 4th amendment introduced in the government of India act 1935. These respective amendments reduced the powers of the governor general (Mahmood, 1992). Molvi Tameezudin (President of Constitutional Assembly) challenged the dissolution order in Sindh high court. The court gave its verdict in favor of the petitioner and concluded that the dissolution was against the law and the president and the Constitutional Assembly could continue.

Thus, the governor general brought the case before Federal Court. Chief Justice of Federal Court (Justice Munir) gave judgment in favor of Governor General Ghulam Muhammad without going to the constitutionality and merit of the decision (Kokab R U , 2013). Therefore the dissolution was validated under the “doctrine of necessity”. The dissolution was justified that constitutional assembly was failed to frame constitution within a reasonable time. The judiciary deviated from its constitutionally assigned duties and validated the government’s decision by giving them undue favor without going into the details of situation.

3.2 Second Phase: Post Constitutional Era

1956 constitution was framed on the model of 1935 India Act and many provisions were same as that in the act. However, there were some differences between the two. As far as powers and jurisdiction were concerned, the new constitution did not bring any major changes in judicial system. The apex court became federal court and one high court for each province in the country. The constitution was based on parliamentary supremacy and the judiciary can exercise their power of judicial review. Supreme Court had the powers to interpret the law and gave its ruling and ensured fundamental rights.

There were two high courts in the country, the jurisdiction of the high courts were same but added only two additional powers on the high court's, first to issue certain writ was maintained under the constitution article 170, second was to transfer cases from subordinate courts to itself concerning a significant question of law (Shah A , 2008)

High courts were allowed to make general rules and to advise for regulating the practice and procedure of courts. Thus, similar provisions as that in 1935 Act, relating to independence of judiciary was required to integrate. Judge of high court and Supreme Court could hold the office till the age of 60 and 65 years respectively (Khan H , 2009). A Judge could only be removed from Supreme Court on a motion passed with two third majority and based on proved of misconduct or mental infirmity (Constitution, 1956)

There were no special provisions for lower court in 1956 Constitution, as the Government of India Act. It comes into view that the issues at lower level were to be governed and ratified by ordinary law for the purpose. The provisions of the pre-constitutional legislative regulated the conditions of the subordinate judiciary service until these laws were regulated.

Consequently, the constitution remained functional for two and half years, only, and was abrogated, in 1958, after the military took over. President Iskandar Mirza issued dissolution of both the national and provincial assemblies (Waseem, 1989) The political activities were banned and General Ayub Khan took over as the Chief Martial Law Administrator This act, of the government, was not appropriate for stable and balance political future of the country and it pave a way for an extra-constitutional procedures

3.2.1 1958 Martial Law: Under Ayub Khan

The imposition of martial law and abrogation of constitution resulted in a complete violation of legitimized system of the country and all the institutions When the General came into power as the Chief Martial Law Administrator, the Laws (Continuance in Force) Order 1958 were promulgated, by the president The general effect of this order was the restoration of law and the jurisdiction of all courts, which further described that the country was to be governed through the provisions of the previous constitution (H Kennedy & Cynthia, 2006)

The martial law regulations and orders were the principle constitutional document. which also directed that all the courts would continue and exercise the same powers and jurisdictions No court challenged or questioned the martial authorities and Martial Law Order or judgment of military courts Military courts of criminal jurisdiction were set up and authorized to punish any person for the violation of Martial Law Regulation Thus, the country was run through the Martial law regulations (Mahmood, 1992)

During Ayub Khan's rule, the executive and judiciary favored one another, as in Dosso Case (H Kennedy & Cynthia, 2006) related to the validity of Laws Order and the imposition of martial law, was challenged before Supreme Court The supreme court bench headed by Chief Justice

Munir announced judgment in favor of government and held that a victorious revolution or a successful coup is an internationally recognized legal method for changing a constitution. Therefore, the chief justice validated martial law through Kelson's theory (Khan H , 2009) under the doctrine of state of necessities. The decision in Dosso's case was a retrogressive one and destroyed the constitutional development and strength

3.3 Third Phase: 1962 Constitution

In 1962, second constitution for was framed and implemented. In this constitution, very few changes concerning the judiciary were made but in certain cases the powers of the existing courts were reduced. The power of judicial review was denied under this constitution and no law could be challenged in the court on the basis that the legislature lacked the necessary powers.

In 1963, first constitutional amendment was introduced through which the power of judicial review was reinstated and the fundamental rights were made justifiable. The procedure of removal of judges in 1962 constitution was that the president used to appoint supreme judicial council for the inquiry against judges and on the recommendation of Supreme Judicial Council the judge would be removed (Khan H , 2009).

Another provision relating to the appointment of Supreme Court judges was their retirement age, qualification and transfer were same as they were in the 1956 constitution. But, the appointment of judges was manipulated by General Ayub Khan. He made the gross violation of the procedure provided by the constitution. He started the practice of interviewing the judges before appointment to the high court. Dr Naseem Hassan Shah himself was interviewed and selected by the same board and ignored the consultation with the chief justice of Pakistan (Shah A , 2008).

3.3.1 1969 Martial Law: Under General Yahya Khan

In Pakistan, General Yahya Khan imposed Martial law for the second time in 1969 by abrogating 1962 constitution. General Yahya Khan did not interfere in the functions of judiciary but through presidential power took some decisions which undermined the independence of judiciary. In 1969, PCO was issued according to which the country was to be ruled by abrogated constitution of 1962 and as well as to the order or regulation made by Chief Martial Law (Chaudhary)

Subsequently, neither the order of martial law authorities nor any proclamation or regulation could be challenged or questioned in any court. All the courts including Supreme Court, High Courts and tribunals were left intact with their powers and jurisdiction and all the laws enforce, before the proclamation, were to continue to function normally. A system of parallel military courts was established to the existing criminal courts, same as under 1958 martial law. However, the courts functioned and derived their authority and powers from Provisional Constitution Order 1969, and not under 1962 constitution. Thus, the powers of Supreme Court judges were taken away completely under the jurisdiction of court order 1969.

The confrontation of judiciary continued in General Yahya Khan's government, as through presidential order, he forced all the judges to submit detailed statements of his property and assets to the Supreme Judicial Council. The Supreme Judicial Council through presidential order held enquiries into the financial affairs of the judges' as a result one judge of high court resigned and those who were found guilty were removed. Further on General Mitha case (Mahmood, 1992, p 10), he asked two judges to apologize for the contempt of martial law.

In general election of 1970, Awami League, East Pakistan party came out as a majority party but was not allowed to form government. As a result, law and order situation deteriorated in East

Pakistan and agitations started General Yahya, after losing East Pakistan stepped down and handed over power to a majority party leader in West Pakistan Mr Zulfiqar Ali Bhutto

Zulfiqar Ali Bhutto came into power through 1970's general election He assumed the office of Chief Martial Law Administrator and as well as the President of Pakistan National Assembly session was called and provisional constitution was passed which ended Martial law This interim constitution was largely the adaptation of 1956 and 1962 constitution This came into force and gave time of one year to frame permanent constitution of Pakistan Thus, a new provision concerning judiciary was that minimum age for a high court judge was fixed to 40 years for the first time and that of retirement age was raised from 60 to 62 years (Shah A , 2008).

3.4.1 Fourth Phase: 1973 Constitution

In 1973, the constitutional provisions concerning judiciary were similar to that of the 1956 and 1962 There were two new provisions in the new constitution, one curtailed the powers and jurisdiction of the superior courts and the second was for the independence of judiciary

The Supreme Court continued as the apex court of the country The apex court exercised all the power and jurisdiction The Supreme Court was entrusted with the task of interpreting the constitution especially the dispute between federal and provincial governments It also had the advisory jurisdiction and appellate jurisdiction Thus, it was stated that "No court shall have any jurisdiction save as is or may be conferred on it by the Constitution or by or under any law" (Constitution 1973, Art 175(2) The second significance was that the judiciary should be separated from executive with in a time period of three years

Zulfiqar Ali Bhutto's government greatly undermined the independence of judiciary by making certain constitutional amendments to subvert the judiciary. The government instead of stopping the practice of military dictators, the civilian government followed the footprint of the previous regimes. Zulfiqar Ali Bhutto politicized the judicial appointments to defend the objectives and policies of party because most of the PPP members were appointed as judges including the office personnel. He also appointed a junior judge as chief justice of Lahore high court who surpassed almost 12 judges and those were more competent than him (Patel, 2004)

Another tool which the government used to confront the superior court was the arbitrary removal of judges and the protection of tenure which is the most significant condition for the independence of judiciary. However, constitution provided proper structure relating to the appointment, transfer, removal and the age of retirement but the government, not only military but also the civilian, deviated from it. Zulfiqar Ali Bhutto's government introduced Fifth Constitutional Amendment in 1976 which reduced the tenure of the Chief Justice of Supreme Court and high courts to five and four years respectively. In this amendment, they gave two options, either to assume the office as the senior most judge of the court or to get retired. The amendment violated provision of constitution which provided protection to the judges under article 209(7). The amendment was made for the removal of Chief Justice Sardar Muhammad Iqbal (Iqbal (J , 2001). Sixth Amendment was introduced to enable Justice Yaqub Ali Khan to complete his five year term as chief justice of the Supreme Court, which was an individual favor for a judge and deprived justice Anwar-ul-haq to become the Chief Justice (Khan H , 2009, p 301)

3.4.2 1977 Martial Law: Under General Zia-ul-Haq

General Zia came in power in 1977, judiciary directly or indirectly, started supporting government. The judiciary was too weak to stand before executive and to initiate any case against it. General Zia-ul-Haq imposed Martial law in 1977, the constitution was not abrogated but was held in abeyance, due to the fear of "Article 6"² of constitution.

General Zia introduced Law Order in 1977 by following the footsteps of Ayub Khan and Provisional Constitutional Order of 1969 (H Kennedy & Cynthia, 2006). Thus, the judiciary was allowed to function but no court had the authority to question Martial law regulations. After that he passed Presidential Order No 1, in which all the high court judges required to take fresh oaths but the Chief Justice of Pakistan and other judges of Supreme Court were not part of this order. General Zia started a new practice for condemnation of superior judiciary by asking them to take fresh oath under martial law, as Chief Justice of Pakistan at that time Justice Yaqoob Ali Khan was unwilling to take a fresh oath. This innovation caused damage to the dignity and independence of the judiciary.

Another important aspect of judicial subversion was "Begum Nusrat Bhutto case". The Supreme Court headed by the Chief Justice Yaqoob Ali, ordered the admission of the petition and postponed the case for next hearing. At that time General Zia retaliated through CMLA's order and amended constitution by revising fifth and sixth amendment and the provision for a chief justice to serve his term of office after reaching the age of retirement was set thus the result was that Chief Justice Yaqoob Ali had crossed the age of retirement and had to retire.

² Article 6 states that "any person who abrogates constitution by unconstitutional means shall be guilty of high treason and the offence is punishable with death or life imprisonment" (Constitution, 1973)

parliamentary to presidential system of government, which is constitutional violation and the court could neither tolerate nor disregard it

3.5 Civilian Governments (1988-1999)

During the interval period of less than 11 years between two military regimes, four civilian governments were formed and removed; the President of Pakistan dismissed the government three times with the help of indirect military support and finally army directly takeover on the civilian government Benazir Bhutto and Nawaz Sharif both became Prime Ministers twice in a very short time from December 1988 to October 1999 (Shah A , 2008) The relationship between executive and judiciary was not good; the civilian governments both Benazir Bhutto and Nawaz Sharif were also on the path of politicizing the independence of the judiciary They converted the judiciary into a subservient institution and oppressed all non-friendly judges of the superior courts

Benazir Bhutto came into power for second time in 1993 left behind all previous governments in the illogical appointment and removal of judges She took some important decisions concerning the judiciary which had affected independence of judiciary She, as Prime Minister of Pakistan, violated the forty years tradition and politicized judiciary in trying to hold their decision according to her interest

The first step was the non-conformation of high court judges who were appointed in Prime Minister Nawaz Sharif's time. Thus, the action was justified and giving the reason that these judicial appointments were not merit based and it's only for political reasons The second humiliating step by the government was that the permanent Chief Justices of the Lahore and Sindh High Courts were appointed as judges of the Federal Shariat Court in 1994 The Chief

Justice of Sindh High Court accepted the appointment but the Lahore High Court Chief Justice resisted and refused to continue as the judge to Federal Shariat Court and got retired. The two newly Supreme Court judges were appointed as the acting Chief Justices of Lahore and Sindh High Court, respectively (Shah C J, 2001)

In Sindh High Court, Justice Abdul Hafiz Memon was first appointed as a judge of the Sindh High Court and subsequently as an acting Chief Justice of the same High Court. Immediately after taking oath, it was discovered that, he would be attaining the age of sixty two years, which was the age of superannuation in the High Court. The Federal Government changed its mind, and after resending previous notifications, another notification was issued under which he was appointed as a Supreme Court Judge and then was sent as the acting Chief Justice of the Sindh High Court (Mian, 2004)

Lahore High Court also faced the same crisis as Benazir Bhutto brought back a retired judge (Justice Muhammad Ilyas) of Lahore High Court, who was in service as a judge of Federal Shariat Court (Shah A , 2008). Thus, the executive gave him special favor and appointed him as judge of Supreme Court but after that transferred him to Lahore High Court as Chief Justice

The third most deviating decision taken by the Benazir Bhutto government, which adversely affected independence of judiciary, was the appointment of Justice Sajjad Ali Shah as the Chief Justice of Pakistan which was unprecedented and illegal act of government because he was on the fourth number on seniority list. The main apparent reason behind this appointment was that she was perhaps carried away by his two dissents apparently in favor of Pakistan People's Party (Mian, 2004). First, Ahmad Tariq Rahim's case, in which the dismissal of Benazir government by Ishaq in 1990 was challenged, Justice Sajjad was one of the two dissenting judges and held

that Ishaq's order to dissolve National Assembly was invalid. He observed that the dissolution was to get rid of the government of the PPP.

In Nawaz Sharif's case where the dismissal of the Nawaz government by Ishaq was under challenge and Justice Sajjad was the only one judge of eleven judges on the bench who upheld the order as valid and expressed disapproval of the way in which Chief Justice Nasim Hassan Shah had announced at the beginning of the proceeding that the nation was about to hear a good news. He also made pungent remarks at the end of his judgment saying that when two Prime Ministers from Sindh were removed under the discretionary powers of the president, and Supreme Court did not restore them but when it was the turn of prime minister from Punjab, the tables had been turned. These remarks must have rung in Benazir's mind while deciding his appointment. She may have thought that, being a Sindh and sympathizer of the PPP, he would go along and protect the interest of her government.

The fourth crucial step regarding the suppression of judiciary was the appointment of judges of superior judiciary without giving weight to the decision of the Chief Justice and merit set by constitution. Government appointed twenty judges to the Lahore High Court and nine judges to the Sindh High Court without the consent of Chief Justice of Pakistan. They were not competent and according to Justice Sajjad some of them did not even appear in the court (Shah C J, 2001).

Thus, from this it was clear that they were their special people who were only selected to give favors to their government. Looking to these unpredictable appointments, Chief Justices Sajjad Ali Shah consulted the Chief Justice of Sindh High Court but in return he expressed his helplessness and said that he made those recommendations because of the pressure that was brought to bear upon him. Furthermore, executive appointed seven ad hoc and acting judges in

Supreme Court nearly equal in number to the permanent judges. Thus Habib Wahab-ul Khair, a Supreme Court lawyer filed a direct petition on behalf of Al-Jehad Trust. This petition challenged the appointment of Justice Saad Saad Jan as acting Chief Justice of the Supreme Court in April 1994 and wanted his verification as permanent Chief Justice (Main, 2004)

Apart from this, another constitutional petition was filed in Supreme Court by challenging the appointment and removal of judges. The constitutional petition was heard from November 5, 1995 to March 13, 1996. On March 20 1996, Supreme Court interpreted various articles of constitution and announced a majority judgment of four to one, which is commonly known as Judges' case. This judgment was highly appreciated and rejuvenated in judiciary as a milestone at home and abroad (Al-Jehad Trust Vs Federation of Pakistan, 1996)

Benazir Bhutto's government was shaken and strongly criticized the judgment instead of accepting in good grace. Even one federal minister portrayed it as an act of treason and harsh statements were made inside and outside the parliament (Mian, 2004). The relation between the Prime Minister and the President were also strained and differences between them grew to such an extent that in November 1996 the former dissolved the National Assembly and dismissed the government on the basis of corruption and degrading the judiciary.

In February 1997, Nawaz Sharif's party came into power through election and formed a government for the second time. The clash between executive and judiciary started when Prime Minister Nawaz Sharif's government took some decisions which were unacceptable for judiciary. The introduction of anti-terrorist law in June 1997 became one of the most important reasons leading to the confrontation between government and judiciary.

This law was strongly opposed and was challenged before the Lahore high court as unconstitutional but Lahore high court gave its judgment favor to uphold the law as valid. This decision was brought before Supreme Court which released its judgment after striking down twelve provisions of the Act as invalid. Because anti-terrorist law established courts and appeal against their verdict were only allowed before a special appellate court and no further appeal was allowed before the Supreme Court. Thus, the Supreme Court headed by chief justice Sajjad Ali Shah stated that "setting up of special courts for trial of classified cases would run counter to the independence of the judiciary" He was opposed to a parallel judicial system (Shah C J , 2001)

The clash further deepened by subsequent measures and converted into a serious judicial crisis and ended with attack on Supreme Court building. The event which further intensified the crisis was the elevation of five judges from high courts to the permanent seats of Supreme Court, as per the ruling of Judges' Case. The executive, especially the PM, opposed and resisted the appointment because two of them were not acceptable to him. Thus, the government immediately issued a notification, from presidential order under article 176 of constitution reducing the Supreme Court judges from 17 to 12 (Khan H. . 1999). A bench of three members headed by CJ suspended notification and restored the original strength by withdrawing the notification.

The next leading event was that the government passed Fourteenth Constitutional Amendment which was the disqualification of the Member of Parliament on the basis of defection, which was also challenged in the Supreme Court. A Supreme Court bench headed by the Chief Justice also suspended the constitutional (Fourteenth Amendment) Act 1997. This suspension was highly criticized in extremely violent language by the government and his allied parties. They criticize judiciary and Supreme Court inside and outside the parliament and said that the suspension of

said amendment is illegal and unconstitutional (English Daily, 1997) They also blamed the Chief Justice of Pakistan of reviving horse trading in the country An advocate Chaudhary Muhammad Akram filed contempt of court petition against PM and some government members Prime Minister Nawaz Sharif appeared before court and expressed his regrets in a written statement over his remarks Nawaz Sharif was the first prime minister in Pakistan's history who personally appeared before the court although it was unqualified regret. Moreover, Supreme Court could not understand and predict the unfortunate consequences of the tussle with government in political set up of Pakistan

In order to protect PM from punishment in contempt proceeding, parliament passed contempt of court bill on 18th November 1997 by making contempt of court case appealable before another bench which would be consisting of the remaining judges of Supreme Court and also mentioned that such a punishment would not be effective for thirty days The judgment would be automatically suspended till the last decision of petition (Iqbal (J , 2001)

This bill was sent to the president for approval but at that time judiciary was trying to use their extra-constitutional powers by preventing president to sign the bill and issued a provisional order The verdict not only restricted the president to give approval to the bill but also directed that if the bill was signed into law it would be suspended The Supreme Court order was an unusual step because there is no such precedent to prevent president from giving assent to a bill passed by the parliament The court could test its constitutionality through their power of judicial review once it became a law

Due to military intervention all the cases were delayed by the court for about a week, so government took full advantage of this one week Malik Asad Ali under article 184(3) of the

constitution filed a petition before the registry of Supreme Court in Quetta against Justice Sajjad Ali Shah and also passed an interim order restricting Chief justice from performing his functions till further order. This action of government was also an unconstitutional move because it was against the Order XXV of Pakistan Supreme Court rules that "all the petition relating to constitutional matters can be registered and entertained only in the main registry at Islamabad" (Shah C J , 2001).

Through an administrative order, Chief Justice Sajjad suspended the order of Quetta bench consisting of two judges. This action led to another proceeding of Quetta bench comprising of three judges and suspended the suspension order. They fixed the appeal of Asad Ali for hearing on November 28th before the three judges' bench.

Apart from this, Sharifuddin Pirzada, worked behind the scene and a similar petition was presented before two judges' bench of Supreme Court at Peshawar. The bench consists of Justice Saeeduzzman Siddiqui and Justice Fazal Illahi Khan issued an order by preventing Justice Sajjad from giving any judgment by using his authority as Chief Justice of Pakistan. They also directed the registry of Supreme Court to take sudden steps and placed the issue before senior judge Justice Ajmal Mian and got appropriate advice for hearing such cases.

On Friday 28th November 1997, the Supreme Court bench headed by Chief Justice of Pakistan heard the contempt case against the government. Thus, preventing the bench from continuing the hearing a pre-planned move of government workers stormed the Supreme Court building. This is memorized as the blackest day in the judicial history of Pakistan. It was one of the terrible attacks on judiciary by the powerful executive.

The powerful executive in Pakistan internally divided judiciary to strengthen his own position and confronted judiciary directly and indirectly. In the first week of December 1997, Supreme Court issued two separate cases lists for hearing. One was regarding the appointment of Chief Justice of Pakistan and the second was a three member bench headed by chief justice for the suspension of the thirteenth amendment in the constitution, thus restoring the President's powers to dissolve the National Assembly. The conflict between the two benches started, the rival group moved on oral motion to suspend the order passed by three member bench of Chief Justice. President Farooq Laghari resigned and mentioned in a press conference the unconstitutional demand of government to appoint Justice Ajmal Mian as acting chief justice and demoted Chief Justice Sajjad Ali Shah (Shah C J, 2001).

After the resignation of Farooq Laghari, a Senate chairman Wasim Sajjad assumed the office of acting President and approved the summary of appointment of acting Chief Justice of Pakistan. December, 2 1997 the acting chief justice, Justice Ajmal Mian took oath.

Soon after, the Supreme Court bench of ten judges headed by Justice Siddiqui started the hearings of Malik Asad Ali's case. The judgment was announced on December, 23 1997 which concluded that the appointment of Justice Sajjad Ali Shah as the Chief Justice of Pakistan was made without any valid and concrete reason therefore, such appointment was unconstitutional and illegal because he surpassed three senior judges without any valid reason. The court announced its final ruling that Justice Sajjad would cease to hold the office and ordered the reversion to his position on seniority basis as a judge of Supreme Court. On December 23 1997, the federal government notified Justice Ajmal Mian as the Chief Justice of Pakistan who took oath on the same day and demoted Justice Sajjad.

The continuous conflict between executive and judiciary led to military takeover in Pakistan. General Pervaiz Musharaf dismissed the Nawaz Sharif's government and imposed martial law. General Pervaiz Musharaf, like General Zia-ul-Haq, asked the judges to take fresh oath under Provisional Constitutional Order (PCO) but some judges refused, thus they were dismissed from their offices (Brass, 2010, p 117)

Unfortunately, it is a historical fact that in Pakistan executive and judiciary relations remained controversial. The role of executive, whether military or civilian, was dominated and judiciary played a passive role. Military is strong and powerful institution in Pakistan and continues intervention by military in politics ceased the process of maturity of political institutions. In Pakistan military as an institution is strong but it failed to understand the relationship with the civilian institution.

Chapter 4

Judicial Activism: An overview of Executive-Judiciary Rift (2005-2013)

The relationship between executive and judiciary was disturbed in General Pervaiz Musharaf's era. The institutional imbalance was very eminent, as the de facto government put the constitution of the country in abeyance. The custodians of constitution, instead of safeguarding the constitution, started favoring the unconstitutional steps of the government. The direct and indirect support from judiciary to the government gave confidence to control other state institutions. In appearance, the country was in peaceful zone but the reality was not much accurate. The government and judiciary, both, violated the constitutional frame work of the country. They deviated from its original function and constitutionally assigned duties. The conflict started when the judiciary claimed about its independence and wanted to secure her constitutionally assigned position.

Initially, the government promised judiciary its independence, full power and jurisdiction under constitution with some restrictions related to the orders of chief executives. Judiciary was not required to take fresh oath under PCO, as in the previous military government of General Zia-ul-Haq. The problem started, when the question regarding the judges' oath came up at the time of retirement of Chief Justice of Peshawar High Court. The issue in front was that what oath should be given to the judges of superior court. Therefore, on mutual agreement, it was agreed that the new chief justice would take oath under the constitution.

In response of this decision, a number of petitions were filed in the Supreme Court by PML (N) leaders challenging Martial Law under article 184 of the constitution and demanding the restoration of assemblies. The petitions were filed and it was expected that the assemblies might

be restored. The government tried to secure its position by making amendments in Office (Judges) Order 1999 and Oath of Office (Judges) Order 2000 was introduced. According to this order, all the judges were required to take oath and perform their duties under Provisional Constitutional Order. But Chief Justice of Pakistan Justice Saeeduzzaman Siddiqi refused to take oath as the government promised judiciary its independence and allowed judiciary to function under constitution therefore those judges who refused were ceased to hold office and only seven judges took oath. The most senior-most judge among them was appointed as Chief Justice of Pakistan.

Judicial independence was destroyed and the government divided judiciary, suppressing it and removed the judges who tried to hold its original jurisdiction and wanted to work as the custodian of constitution. General Pervaiz Musharaf like the other military dictators strongly influenced judiciary and enjoyed favorable decisions. This institutional imbalance was not for the first time in the history and the event repeated itself. The governments, whether military or civilian, tried to maximize its power over the other institutions like judiciary. The institutional disequilibrium remained as the executive always exercised absolute power. The same absolutism was also practiced by General Pervaiz Musharaf by performing certain extra-constitutional measures through the judiciary.

The validation of military takeover is a usual act of judiciary in Pakistan, the constitution also states that military can take over state's control when political instability occurs but the de facto government has to announce election within 90 days. Thus, General Pervaiz Musharaf declared emergency on 14th October 1999 throughout the country and dismissed provincial and national assemblies. The previous government challenged military takeover, as it is an unconstitutional act and seeking for the restoration of assemblies. The petitions against the military take over and

restoration of assemblies was filed for hearing. A Supreme Court bench consisting of twelve members and headed by Chief Justice Irshad Hussan Khan gave unanimous decision by validating martial law rule under the Kelson's theory. The judiciary, thus, granted executive and legislative authority to Musharaf for three years (Baig, 2009). The custodians of constitution, instead of taking appropriate action against illegitimate action of Musharaf, gave him absolute powers.

Military government always deteriorated institutional accountability and transparency for strengthening their position. General Pervez Musharaf removed President Tarar from the office, even though he did not resign nor did his office term expire. The office of president became vacant; therefore, Pervez Musharaf announced referendum to stay in power as president of Pakistan. He wanted to fill the self-created vacuum which is a well-known strategy of the military rulers as General Ayub Khan in 1960 and General Zia-ul-Haq in 1984 practiced the same procedures to seize the office of president for next five years (Khan, 2009, p. 484).

This was an unusual step of General Pervez Musharaf because according to 1973 constitution the president must be elected through provincial and national assemblies and by the parliament of Pakistan. In this referendum the Election Commission was not independent and the process of referendum was also unfair. There were no electoral lists and no registry of voters. Every person was free to cast their vote wherever he/she wanted to and even a person could cast vote at 20 polling stations. The result of referendum was surprising as he secured 97% of votes in his favor (Majeed, n.d.).

The unconstitutional referendum was challenged before the Supreme Court with a number of constitutional petitions and elaborated constitutional process of electing president. Supreme Court in "Hussain Ahmad v Pervez Musharaf" case stated that the plea before it was not mature.

On 27th April 2002 a short order was announced by the Supreme Court that the questions regarding referendum were purely hypothetical, academic and presumptive, and court would determine it at a proper time and forum. After a month, the Supreme Court announced detailed judgment which was totally different from that of the short order.

The powerful executive General Pervaiz Musharaf made constitutional amendment in December 2003 for further strengthening and legitimizing his regime. Seventeenth amendment validated Musharaf's dual offices and exempted him from constitutional prohibition related dual role and allowed him to continue as, both, the President of Pakistan as well as the Chief of Army Staff (Constitution (Seventeenth Amendment) Act, 2003). The amendment also validated LFO 2002 (Legal Framework Order) which backed the dissolution power to the president through Article 58(2)(b) and set retirement age sixty five years for Supreme Court judges (Khan H , 2009).

The Amendment was challenged before Supreme Court regarding its validity. In response to the filed petition the court limited its power of judicial review and stated that the constitutional amendment "can be challenged only on one ground, viz , it has been enacted in a manner not stipulated by the Constitution itself". The court further elaborated that the constitutional amendment is a political question which can be decided through the normal procedures of free election and parliamentary democracy. The superior judiciary could not strike down the constitutional amendment even if the amendment violated constitutional features (Qureshi, 2010).

The court gave its final judgment by showing their helplessness that the court is bound to follow the orders of the executive and also ensure that it would make every possible attempt to reconcile the statute of the constitution. The court refused to reverse the Seventeenth Amendment so the constitutional structure doesn't collapse. Thus, the court concluded that to strike down a law

where an action would create constitutional crisis and chaos is not the judiciary's function. Therefore, the court allowed the government to function and also allowed the state institutions to achieve strength and to get mature with time (Qureshi, 2010). In the past the judiciary validated constitutional amendments to strengthen executive position. These were the specific reasons which promoted judicial activism in Pakistan.

4.1 Judicial Activism

Judicial activism implies that the judiciary is proactively reaching out to initiate change in policy or action by the executive and the legislative branches. Judicial activism may have a proper role in an independent judiciary based on a concept of separation of powers, however, if the Court continually ignores executive excesses, it "might appear to be abdicating its duty to interpret the Constitution if it is consistently punting on hard questions." Thus, even if policy questions emerge when the Court is analyzing a controversy, "the Supreme Court can and should declare what the law is, even in difficult or politically sensitive cases" (Awan, 2013).

The term Judicial Activism and its constitutional validity by the supreme court of Pakistan were founded in 1973 constitution's Article 184(3). According to this Article the "Supreme Court under its original jurisdiction can pronounce declaratory judgment inter alia on a question of public importance with reference to the enforcement of any of the fundamental rights" (The Constitution of Pakistan 1973 Art 184(3)). The judicial independence and judicial activism were present only in theory, the practice was totally different in Pakistan. Since independence, military or civilian government tried to strengthen executive over judiciary. In Pakistan the judicial resistance against the executive was found in the time of Chief Justice Sajjad Ali Shah in late 1997 (Khan M S, 2014).

4.2 First wave of Judicial Activism (2005-2007)

The relationship between executive and judiciary was not smooth during military government of General Pervaiz Musharraf. The executive used the judicial power in accordance with their interest and weakened judiciary by constitutional amendment, such as the seventeenth amendment made by General Pervaiz Musharraf. The government did not require any considerable support as the most senior judge Ifikhar Chaudhary was loyal to government and was appointed as Chief Justice in 2005 (Khan M S , 2014)

Musharraf felt more secure with Ifikhar Chaudhary as he was among "Musharraf's handpicked judges appointed to the Supreme Court, replacing the six judges who refused to take an oath under the martial law's Provisional Constitution Order (PCO). Chaudhary was on the twelve-member bench that validated the coup on grounds of necessity (Zafar Ali Shah v General Pervez Musharraf 2000), the nine-member bench that upheld Musharraf's extra-constitutional referendum to become the president (Qazi Hussain Ahmad v General Pervez Musharraf 2002), the five-member bench that upheld Musharraf's amendments to the Constitution (Watan Party v Chief Executive of Pakistan 2003), and the five-member bench that allowed Musharraf to retain the role of army chief during his first presidential term (Pakistan Lawyers Forum v Federation of Pakistan 2005). Chaudhary was elevated to chief justice in June 2005 (Ghias 2012)

The appointment of Ifikhar Chaudhary to Supreme Court as Chief Justice in 2005 would have carved out a new role for the court (Ghias, 2012). During the first year, the Chief Justice Ifikhar Chaudhary's court dealt with governance and policy issues. He established human rights cell to check the misuse of authorities and reduce human right issues. The court used its Suo Motu jurisdiction to deal with growing human rights problems. The court identified different

categories of cases such as related to Policy Reforms, Human Rights, and legislative override and environmental and land use regulations (Khan M S , 2014)

Chief Justice Ifikhar Chaudhary after coming into power gave more importance to the public interest litigations. An earthquake in Pakistan in October 2005, brought large scale destruction and seventy five thousand people passed away. The reason was the demand for high-rise office space and urban housing but the lack of safety measures for urban planning had not improved. A petition was filed against the construction companies and Capital Development Authority (CDA) by the residents of the collapsed towers. The petitioner stated that CDA did not take any notice on the repeated complaints about the material flaws in the tower.

The court ordered CDA to provide accommodation to the residents and also investigate the focal persons who were responsible for the defective construction (Saad Mazhar v Capital Development Authority 2005). The earthquake provided a chance for Supreme Court to intervene in the construction safety. After two months, a large scale investigation started ordering provincial officials to give a report of collapsed government schools, colleges and universities and ones is responsible for the defective construction.

In 2006, the Supreme Court took a case from Lahore High Court that the Lahore Development Authority refused to restrict the high-rise buildings construction without proper safety measures. On the investigation of Supreme Court, it was revealed that there was no structural engineer with LDA to guarantee structural stability. In 2007, a bench of two members gave final judgment and restricted all the buildings to over three stories. Another petition was filed against CDA in 2006 related to the lease of public parks in Islamabad. The court announced that the lease agreement violated fundamental rights. The judicial intervention in the issues related to public importance took control of low level of corruption.

The court also started intervention in the oil and sugar price control as it involved high level of corruption. In 2004-2005 when international oil prices accrued, the ministry of petroleum gave the power to a consortium of oil companies to set petroleum prices. The issue started when the consortium companies increased the oil prices when the international oil price rose but did not decrease when it dropped. In 2006, a bench headed by Chief Justice Ifukhar Chaudhary heard the case challenging the oil hike and started investigation on a large scale whether the consortium companies are in collaboration with the corrupt official from Ministry of Petroleum or not. Thus, the court asked the National Accountability Bureau to investigate this issue (Iqbal, 2006).

The country also faced sugar crisis in 2005-2006 and in a very short time period the prices of sugar became double. The chief justice took *Suo Motu* action by using his judicial powers and forwarded the case to NAB for investigation to find out the responsible persons. The report of NAB declared that the soft policy of government and eight current ministers were responsible for the sugar crisis (Ghias, 2012).

In 2001, the government started arresting and detaining citizens and foreign nationals who were suspected to be linked to terrorist activities. Political opponents such as activists and minority ethnic groups demanded protection from government. Especially the victims of forced disappearance and held in undeclared places of detention run by Pakistan's intelligence agencies, with the government (Denying the Undeniable enforced Disappearance in Pakistan , 2008)

The conflict between executive and judiciary started when Musharaf denied court's order. Chief Justice Ifukhar Chaudhary took notice on the issue of missing persons to stretch the traditional Pakistani judicial role continuing when he led the charge to take General Musharraf and the military to task on the secret terrorism detentions. In December 2005, the Supreme Court took judicial notice of a newspaper article about the "enforced disappearance" of an activist and began

to challenge the Pakistani government about his and other enforced disappearances. Even after the suspension of chief justice in 2007, the other Supreme Court judges continued the case and held regular hearings. Thus, in a very short time period, from October 2006-November 2007, 186 people were traced out (Denying the Undeniable enforced Disappearance in Pakistan , 2008)

The missing persons' case was a serious issue and the court, at that time, took strict notice that no government official would escape scrutiny. The Chief Justice also told the director general of Federal Investigation Agency that the "Missing persons must be produced today or you will be sent to the lockup" (Hasan, 2007)

The Court also began issuing orders to government officials to appear before the Court and to locate the disappeared people. Each missing person's case brought before the court was individually researched to determine the person. Therefore, Chief Justice made it clear that the purpose behind this inquiry was not to release guilty people but make sure that each person was ensured his rights and their families could know the missing persons' locations. Further, Chief Justice Iftikhar Chaudhary stated that "We are not asking for immediate release of the disappeared, but want legal proceedings according to the law by regularizing the arrest of people who had later gone missing"(Iqbal, 2007)

The last case on enforced disappearances was heard on November 1, 2007, two days before Musharraf declared a state of emergency on November 3, 2007. According to the viewpoints of some analysts "the timing of the proclamation of emergency and of the dismissal of judges of the higher judiciary matched with the increasingly demands of court to call high officials of the intelligence agencies to testify the detention (Denying the Undeniable enforced Disappearance in Pakistan , 2008) The confrontation between the state institutions led the country once again to the state of emergency. There was a lack of check and balance mechanism between executive

and judiciary and always exercised the powers which were not belonging to them which caused instability and destroyed democratic values

4.3 Privatization of Public Enterprises (Pakistan Steel Mills Corporation)

Government “started Privatization scheme and established Privatization Commission” chaired by Finance Minister Shaukat Aziz. The purpose of commission was to administer the sale of state enterprises. Before the appointment, as Finance Minister, Shaukat Aziz was the vice president of Citibank of New York. In 2004, he was appointed as prime minister but also held the position of finance minister and chairman of privatization commission. In 2005, the government privatized Pakistan Telecommunication Corporation Ltd (PTCL) with the collaboration of Citibank. The privatization resulted labor union protests to reverse privatization but government refused their demands.

4.3.1 Pakistan Steel Mills Case

Pakistan Steel Mills Corporation (PSMC) was the largest manufacturer of steel in Pakistan. Initially the company was financially weak due to lack of financial assets but after restructuring the financial standing also increased. Prime Minister program of privatization of state enterprises also decided to privatize Pakistan’s largest steel producer corporation. The government started to publicize information, value shares and asked proposals for PSMC. A group of three companies, Magnitogorsk Iron & Steel Works, Al-Tuwairqi Group, and Arif Habib Group, bought 75% of the stock for Rs. 21.68 billion and the share of each was Rs. 16.80. These groups also achieved management control of PSMC as one of the purchaser Arif Habib was friend of the Prime Minister.

The privatization was challenged by the opposition parties and the labor unions and objected the corruption charges to the privatization commission. The point of argument was that the enterprise was sold at low prices than its land value and the equipment and inventory were not mentioned. On the petition in 2006 the Supreme Court heard the case (Ghias, 2012)

Chief Justice Ifikhar Chaudhary's decision on PSM showed his motivation to extend the constitutional interpretation. The court used its power of judicial review to confront the government actions as much as possible. Chief Justice accepted the petition against the government and according to the court's original jurisdiction it allows the court to accept a petition on the request of any aggrieved party if the issue is related to public importance and no alternative remedy exists (Khan M S, 2014). Thus the court used the precedent to broaden the issue and confronted the executive. The petition of Workers' Union mainly consisted on the argument against the transparency and process of property sale, that the privatization was amended when it was finally approved by the Council of Common Interest. Three individual buyers had been approved and not the consortium and PSMC had been undervalued as an incentive to the consortium.

Chief Justice Ifikhar Chaudhary continued and expanded interpretation of the case. According to the power of judicial review, in the constitution, the judiciary does not interfere in pure policy matters or give any opinion until the policy itself proves as unconstitutional. Therefore, chief justice reframed the issue that it is no more a political question as it includes problems such as law, legality and transparency of privatization process. It also became a matter of judicial intervention.

According to the Privatization Ordinance of 2000, it should have been the endeavor on the part of the Privatization Commission to get highest price, the valuation did not include the land upon which PSMC built up and its assets. They were grossly understated. Though the Privatization Commission recommended a price of Rs 17.43 per share and the CCOP decided on a price of Rs 16.18 per share. Furthermore, the CCOP approved huge incentives for the final buyer which were not included in the initial public offering, including payment of loans and acceptance of legal liability for workers' claimed by the Government of Pakistan.

The court gave its judgment that the approval of the consortium was not proper and the procedural irregularities occurred during approval process twisted in favor of Arif Habib. The CCOP and Privatization Commission knew that Arif Habib was involved in nine civil and criminal cases. This questioned his corporate identification and should have disqualified him, but the issue was not discussed by the groups. In the final contract, the ultimate purchasers were different from the initial. The consortium consisted of Magnitogorsk Iron & Steel Works, Al Tuwairqi Group, and Arif Habib Group but the final contract was between the Government of Pakistan, Arif Habib Securities Limited, and Arif Habib himself.

After the valuation and approval procedure, the court stated that it reflects indecent haste by the Privatization Commission and the CCOP. The entire process of privatization, from the initial proposal by the Pakistani Government to the final valuation report to the eventual sale, occurred within two days. Chief Justice Iftikhar Chaudhary also stated that CCOP's decision betrays the rules and the relevant material and thus failed to test of reasonableness laid down for the exercise of the power of judicial review. The Court's final holding invalidated the sale and purchase of the Pakistan Steel Mills Corporation.

The final judgment of judiciary brought instability as Musharraf's reaction to this ruling can be seen in the Proclamation of Emergency promulgated on November 3, 2007. The Proclamation claims that emergency rule is justified because of the increasing interference by some members of the judiciary in government's policy, adversely affecting economic growth and weakening the writ of the government by constant interference in executive functions.

4.4 Second wave of Judicial Activism (2007-2009)/Lawyer's Movement

The relation between executive and judiciary remained deteriorated when judiciary challenged the government in certain matters and used the power of judicial review. The clash started when powerful executive suspended Chief Justice Iftikhar Chaudhary on the allegation of the misuse of authority. The power to dismiss him rested only with the judicial commission. At the time of suspension the most senior judge and a member of supreme judicial council Rana Bhagwandas was on leave. The government used tactics to get favorable decision but Bhagwandas cut his personal leave short and came back to Pakistan to resolve the issue but the council's judgment rolled in government's favor.

The acting chief justice Rana Bagwandas' first step was to challenge the residential reference and proceeding of supreme judicial council. Thus, he accepted the petition and appointed a five member bench to stay the council proceedings and recommended the formation of thirteen member bench to hear the petition. As the Supreme Court bench deliberated on the president's reference against Chaudhary, the political situation deteriorated. The decision in Chaudhary case became imminent, the lawyers intensified their rhetoric when the government started military operation on Lal Masjid in Islamabad. Therefore, Supreme Court gave its final verdict on 20th July 2007 and reinstated Chief Justice Chaudhary and dismissed presidential reference.

The main purpose of Musharraf's emergency was to eliminate the constitutional courts and to obtain judicial confirmation of re-election as president. After restoration, Chaudhary receded himself from any cases involving Musharraf but the Court resumed the governance and political functions. Chaudhary focused on public interest litigation, including high-level corruption scandals, and reopened hearings on the sugar and oil price-hike cases. In August 2007, secretaries from the ministries of finance, industries, commerce, and agriculture were summoned before the Court. Thus, the NAB investigation had implicated eight ministers and other leaders for sugar storage. The court also reopened the politically sensitive issue of missing persons. Because of the pressure from the Supreme Court, the government was forced to accept the detention of more missing people, and to release them. The resulted decisions of the above cases led Chaudhary to the second constitutional crisis on November 3, 2007 (Ghias, 2012).

The sole aim of Musharraf's second emergency was to eliminate the constitutional courts so as to retrospectively obtain judicial declaration for his re-election as president. Musharraf quickly and unceremoniously removed a large majority of office judges and appointed Abdul Hameed Dogar as the new Chief Justice. Chief Justice Dogar's court admitted several petitions of Musharraf's emergency. These petitions had become jointly known as "Tika Iqbal Muhammad Khan v General Pervez Musharraf".

The court's judgment came after mere ten days making it one of the speediest judgments to be generated on a highly important political question. The court held, that the de facto ruler's actions were in the interest of State necessity and for the welfare of the people. So court gave validity to Musharraf's extra-constitutional emergency as to save the country from chaos and anarchy. But the Tika Iqbal judgment stands apart from the previous two precedents in one peculiar way: the focal point of the court's ire and scorn was the Chaudhary's court's unfettered

intervention in political questions. The gravamen of the court's disapproval was the former chief justice's excessive reliance on, and habitual misuse of, the original jurisdiction of the court under Article 184(3). The court indulged in a lengthy survey of precedents to make it abundantly clear that the power and jurisdiction under Article 184(3) of the Constitution cannot be invoked for redress of individual grievances, but that unfortunately, the former Chief Justice of Pakistan paid no heed to the judicial precepts. The court further carped that Chief Justice Chaudhary had exercised hegemonic powers over the rest of the judiciary by arrogating to himself the function of superintending the subordinate courts and siphoning off selective cases pending in the high court's and subordinate courts to the apex court. The court, thus, signaled a major retreat from activism (Khan M S, 2014)

Almost two years of continued and highly publicized mass protests supported by media and political parties elevated Justice Chaudhary and his colleague's status from undecided darkness to celebrated symbols of resistance against autocratic rule. The eventual restoration of Justice Chaudhary as Chief Justice a highly protracted affair took place on March 22, 2009. The popular and institutional support accumulated by the restored judiciary acted as an important catalyst for its judicial activism in the early post-restoration years (Siddique 2015)

4.5 Third Wave of Judicial Activism (2009-2013)

After 2008 election a new democratic government of Pakistan People's Party was established and continued to work. In start the new government showed some resistance on the restoration of judges who were suspended as a result of Musharaf's second emergency in November 2007. The government signed an agreement before elections that they will restore the deposed judges, after the elections, but after the elections they were hesitating to do so. Government of Asif Ali

Zardari was fearful for their regime that, if they resorted to Ifikhar Chaudhary, ultimately he will be empowered enough to reopen corruption charges against him. Thus, a successive long march consisting of legal community, political parties and masses eventually reinstated judiciary.

Chief Justice Ifikhar Chaudhary was restored after a powerful massive movement in 2009. The confrontation between the executive and judiciary became more prominent. The continued intervention of court in executive and legislature territory through case laws disturbed the political stability of the country. At the institutional level the judiciary wanted to exercise veto power over the judicial appointment and restricted the power of subversion of any government agency. Furthermore the superior judiciary pursuit of public interest litigation through frequent *Suo Motu* actions taken in a populist mode led to brinkmanship on the part of the executive and judiciary (Waseem, 2012). The independence of judiciary became a big question mark for the government that whether the current government would complete its tenure or not in the presence of a strident Supreme Court.

The institutional imbalance seemed imminent during PPP government on various cases on the context of oversight of the executive's functions of appointment, promotion, and transfer of judges and executive as well as related to the constitutionality of certain laws made by Musharaf's government. The clash over Supreme Court's decision became more broadened from 2009 and executive felt alienated by Supreme Court's decisions. The tension between the executive and judiciary represented a real challenge to democracy in Pakistan. The issue of the independence of judiciary was comprehensively revised in 2009.

The eighteenth constitutional amendment was introduced during PPP government. The main concern of eighteenth amendment was to make judicial appointments to the constitutional court more participatory and transparent. This was completed by establishing a two-step process.

involving multiple stakeholders including judges, legal representatives from the government and professional lawyers' organizations as well as parliamentary representatives from both the government and the opposition. Thus, the judiciary was not willing to this constitutional amendment. Therefore, the Supreme Court essentially restricted legitimate powers of other branches of government while simultaneously separating itself from constitutional check and balance.

The eighteenth constitutional amendment was challenged in *Nadeem Ahmad v federation of Pakistan*. The Supreme Court demanded changes to this new process for judicial appointments on the pretext of safeguarding judicial independence focusing particularly on severely limiting the discretion of parliamentary representatives. To avoid any confrontation the government accepted the court's demands through another constitutional amendment. Thus, a new precedent was set in favor of the court's authority to override Parliament's power to amend the constitution. In a subsequent decision, the court affirmed its internal control over issues of judicial appointments and accountability decisively insulating itself from both the executive and the legislature (Khan M S , 2014)

The institutional disequilibrium and the transaction of judicial power over the executive and legislature were very dominant in this era. This increased its power by insulating from the other organ of the government. The court intervened time and again to declare various key executive appointments illegal on the basis of process-based arguments. Additionally, the court also directed the concerned ministry or department to make fresh appointments in accordance with the proper constitutional process elucidated by the court itself. Apart from executive appointment the most controversial cases were those that forced accountability on members of the executive for matters completely within their domain and discretion (Awan, 2013)

The courts under powerful Chief Justice Iftikhar Chaudhary worked only for the strength of one institution and underestimated the others. The custodian of constitution instead of safeguarding the country's constitutional framework violated it for their personal pleasure. The Chief Justice not only disapproved constitutional amendment but also disqualified those judges who took oath under Musharaf's second time emergency (Siddique, 2015). Thus, it was a personal clash of state leadership rather than institutional. As the history witnessed that Chief Justice Iftikhar Chaudhary was also a PCO judge who took oath under Musharaf's first PCO and was an active member of those benches who validated Musharaf's certain unconstitutional acts.

In 2011, the Supreme Court began an inquiry into the contents of a column published in a Newspaper which suspected that a Pakistani official had delivered a memo to the U.S. military on behalf of President Zardari. Among other things, this memo requested the U.S. government's support in forming a new national security team in Pakistan that undercut the de facto powers of the Pakistani army and intelligence services. Allegedly, the motive behind the memo was to prevent yet another military coup in the aftermath of the U.S. raid on Osama bin Laden earlier that year (Waseem, 2012).

This was arguably a purely political issue. It had no constitutional ramifications and there was no infringement of Fundamental Rights. Nonetheless, the court accepted jurisdiction on the basis of a potential risk to national security, insinuating that the government was accountable and subordinate to the military and the intelligence services. It also pointed to a conspiracy within the government, arguing that when citizens know that their rulers are conspiring against them, it is a violation of their dignity. In its vitriolic pursuit of the suspected author of the memo Hussain Haqqani, the Pakistani Ambassador to the United States at the time, the court further fueled an

impression the media had created that executive officers of the civilian government were involved in anti-state activity (Kalhan, 2013)

In *Memogate* issue the court exercised its authority over the executive as of right and announced its judgment by arguing that with the expanding prospect of Articles dealing with Fundamental Rights “every executive action of the Government or other public bodies” if arbitrary, unreasonable or contrary to law, is now amenable to writ jurisdiction of Superior Courts and can be validly scrutinized on the touchstone of the Constitutional mandates

Another politically loaded case involved the court’s exercise of power to remove the then Prime Minister Yousaf Raza Gillani from office for contempt of court. Gillani was convicted on the ground that he refused to carry out its order to ask the Swiss government to reopen corruption cases, specifically money laundering, against President Zardari. The court, thus, created a constitutional crisis that embroiled the country for months

Chapter 5

Executive-Judiciary Rift: A way to Democratic Transition

Democracy is a continuous process which needs procedure and proper understanding of the rights and duties of the people. In a democratic system, people are the beneficiaries and are directly affected due to wrong decisions as well as grievances between institutions. Constitutional democracy can be exercised through proper implementation of check and balance system (Khalid, 2013). Check and balance system can ensure synthesized power structure regarding manipulation and overlapping of decisions.

Unfortunately, Pakistan could not enjoy the democratic process and its utilities since its independence because from the beginning the state experienced institutional imbalance. The state political system was dominated by the bureaucracy and military. These institutions were more organized and developed than the political and democratic institutions. The interim constitution also strengthened bureaucracy and authoritarian governance (Awan, 2013). Military and bureaucracy maintained their professional position in all matters.

They became the cause for failure of democracy and threw the civilian leaders into the back corridor. The weak and fragmented political institutions found it difficult to maintain themselves without the support and collaboration of military. The military also influenced the judicial system and used judiciary for their own objectives (Khan H , 2009). The intervention by the military in the affairs of political as well as judicial institutions created disharmony and generated several types of clashes between the two institutions. Therefore, democratic process has always failed in Pakistan. The military continuously increased its role in policy making and management.

Since independence Pakistan has seen the clash between executive and judiciary, the clash derailed the democratic process in the very earlier years after the establishment of Pakistan. The clash between the two institutions gave a way to the military to come in power. In October 1958, the military swept aside the fragile democratic institutions and established its direct rule and took the charge for executive affairs. However, the judiciary of that time supported the actions of military by issuing a decision in the context of doctrine of necessity. Although, the Executive and Judiciary enjoyed good relations but it disturbed the democratic process of the country.

General Ayub Khan's martial law regime had been legitimized by the federal court of Pakistan in the light of Dosso Case (Kokab R. U, 2013). Ayub's Basic Democracy, 1962 constitution and referendum dismantled and weakened democratic institutional process in Pakistan (Khan H, 2009). Both the military dictators Ayub Khan and General Yahya Khan attempted to disgrace political leadership and left them completely insecure. Rebuilding of national integration was not addressed and institutional making process was intentionally demed.

After a long period of time, Pakistan moved towards democracy and legitimacy. In 1971, country faced new challenges like state-building and institutions building process. The new government of Zulfikar Ali Bhutto promised democracy and finally framed 1973 constitution. Bhutto was a democratic leader but was victimized by different types of errors. He dissolved Baluchistan Assembly and created disturbance in NWFP Assembly (Khan H, 2009). His huge flaw was that he curtailed the power of judges which evoked negative and non democratic behavior of the government and a clash between executive and judiciary took place. A way was given to the military to enjoy executive's powers. The democratic process was derailed in Pakistan once again.

Zia-ul-Haq imposed martial law and further reinforced his political ambitious plan Zia-ul-haq was constitutionally acknowledged by Supreme Court in the light of necessity. During this era, executive-judiciary harmony was seen as in 1985 just because that judiciary was working under the subordination of military which was also the executive power (Mahmood, 1992). There was no clash between executive and judiciary but unfortunately there was no democratic government either

The political situation was changed in 1988 when the military government decided to transfer political power to the civilian government As it was already decided to provide limited political power to the next civilian government, successive democratic government was extremely victimized Horse trading, nepotism and negation of the institutions were pointed out. President Ghulam Ishaq enjoyed the confidence of the military

The Prime Minister Benazir Bhutto during her first term was not allowed to interfere in any state's domestic and foreign policy (Shah A , 2008) In second term Benazir's government could not maintain healthy relations with judiciary because she was dominated by the concept that her father was hanged because of the illegitimate decision of the judiciary She wanted to restrict the intervention of military in the judicial affairs but she was victimized by the bureaucracy and military

Nawaz Sharif experienced unstable relations with judiciary During the second tenure of Nawaz Sharif, a great conflict between executive and judiciary began In 1997, a huge clash was seen when PM Nawaz Sharif's government circled the surroundings of the Supreme Court to frighten and warn Supreme Court to not hear some specific cases against the executives Throughout his tenure, the democratic elected Prime Minister could not collaborate with judiciary The clash

between the two institutions did not allow the democratic process to strengthen and secured a way for the military takeover in Pakistan, once again History was repeated and, in 1999, military rejoined the executive institution by removing the elected government of PM Nawaz Sharif (Newberg, 1995)

In Pakistan, military, as an institution, is strong but it failed to understand the relationship with the civilian institution In the political development and in democratic process each segment of society and each institution of the state are important and have to play an active role to strengthen state's institutional framework Not only the military but no other institution has ever worked in its own sphere

The judges, who were the advocates of democracy, were sacked by the Chief Executive General Musharaf He introduced Provisional Constitutional Order (PCO) The judges, who supported the military actions, took the oath under the PCO As in previous martial laws, there could be seen executive judiciary collaboration, similarly in this era, till 2005, the healthy and strong relations existed between the military government and the subordinate judiciary (Shah A , 2008) All democratic leaders, who were the real representative of the people, were banished from the country and threw in exile

In 2005, President General Musharaf appointed Iftikhar Chaudhary as the Chief Justice of Pakistan and a new chapter began in the history of Pakistan The non-democratic military government experienced a series of conflicts with the judiciary The history changed its shape The subordinate judiciary came on the front position

After taking the oath of Chief Justice, Iftikhar Chaudhary did not collaborate with the military government and a lot of cases against the executive of that time were heard The biggest and

popular case, which marked the fault line between executive and judiciary, was steel mills case. It is considered that, because of this case, the judiciary denied the subordination of military and carried the flag of independent judiciary in Pakistan. The government wanted to privatize steel mills to make some people beneficiaries. The Chief Justice was in favor of the characteristic of merit. This case brought the two institutions against each other and the clashes between executive-judiciary increased speedily.

The missing persons' case gave more weight to the judiciary and the public opinion was going in the favor of the Chief Justice with consistency. The military government became unpopular among the common man on a continuous basis. To hide the ill doings and illegitimate actions of the executive, General Musharaf dismissed Ifikhar Chaudhary from his post by refraining that he misused his powers for his son (Arsalan Ifikhar). Although, Ifikhar Chaudhary was restored by the effort of the Lawyer Movement and he won his case in the Supreme Court (Qureshi, 2010).

In 2007, Lal Masjid case proved a heavy stone in favor of the judiciary. As Ghazi Abdul Rasheed from Lal Masjid (located in sector G-6 of the capital of Pakistan), declared a rebellion behavior against the government of General Musharaf by acquiescing that the Western culture was being promoted by the government. In the response of this behavior, the military man General Musharaf took out the weapons against the rebellion. A lot of people were killed in the military operation and the case of this operation was brought in the Supreme Court by the victims of the operations. Chief Justice asked the government for the reasons of this operation due to which a number of people were killed. This case provided publicity to the Chief Justice and brought a bad name to the president of that time. The authoritarian government did not abstain from illegal actions and the emergency was imposed in the country on 3rd November

2007 The judges were dismissed, once again, and Justice Abdul Hameed Dogar was appointed as the Chief Justice, who legitimized the illegal actions of government again

This emergency gave a huge support to the democratic leaders to send military into the barracks from the executives. The democratic leaders held great public gatherings in favor of the restoration of judiciary. But unfortunately, in December 2007, the public leader (Benazir Bhutto) was assassinated. This was the last nail in the coffin, which totally weakened the authoritarian government in Pakistan. In 2008 the elections were held and the democratic government took the charge of the executive. However, a military man was the president and remained in the government.

In August 2008, General Musharaf retired from the presidency and the truly democratic government started ruling over Pakistan. It was for the first time in the history that the clash between the military government and the judiciary provided a chance to democracy. The conflicts from 2005 to 2008 between executive and judiciary discouraged the military to takeover in the future. This era can be written as the golden time because it strengthened the democratic process in Pakistan rather than weakening it (Waseem, 2012).

Pakistan People Party government initially announced the release of the judges from the house arrest but failed for the complete restoration of the judges because the government was under the pressure of military. A great movement was begun by the popular leader (Mian Nawaz Sharif) and ultimately in 2009 the democratic government restored the judiciary because of the public pressure. Now the true democratic government as well as an independent judiciary was working in Pakistan. Military had no direct intervention in the affairs of executive and judiciary.

The national reconciliation order (NRO) was introduced by General Musharraf, on which a lot of political parties had their serious reservations. These political parties took his case to the Chief Justice. The case was against the government of that time. This is considered as the first conflict between the executive and judiciary in its new era. Later, a bundle of cases created uncertainty in executive-judiciary relations. The democratic elected government of that time could not maintain a friendly atmosphere with the judiciary as in the previous democratic governments. A hostile environment between the two institutions could be observed.

Some prominent cases, which can be written under the context of executive-judiciary clash are the memo gate scandal, Swiss case and contempt of court by the Prime Minister (Yousaf Raza Gillani) of Pakistan People Party (PPP) (Khan M S, 2014). These cases created conflicts and uncertain institutional imbalance but failed to derail the democratic process in Pakistan. Throughout the PPP era the executive-judiciary clash prevailed but the weak democratic government did not lose its identity. The government completed its tenure of five years democratically and constitutionally. No martial law removed the elected representatives from the executive seats.

This was also a new chapter in the history of Pakistan that one democratic government transferred the powers to another democratic government. Although a lot of controversies were spread by the bureaucrats and analysts that the military will be taking the charge again and the democratic leaders failed due to bad governance. Institutional imbalance deteriorated executive-judiciary relations. But all perceptions proved just rumors, there was nothing in practical.

In 2013 elections, some democratic leaders accused the Chief Justice for his personal involvements in the rigging of the elections but no evidence exists on the screen. The democratic

elected government has worked with consistency with a legal, constitutional and legitimate right so far. There is no apprehension for the military takeover in Pakistan. The present government has no clash with the judiciary. There is no institutional imbalance but the environment is little unstable, due to unhealthy relations with opposition.

It can be hoped that the democratic governments of Pakistan will not commit the errors as they did in the past so that the democratic process can be strengthened and the people of Pakistan will enjoy the benefits of mature democracy. Rather than the executive-judiciary clash, executive-judiciary collaboration will prevail. All the institutions will work in their own domain. No institution will bring a failure to the democracy in the country. The weak democratic government, with the help of military and judiciary, will be converted into mature democratic institution. The independent judiciary will provide the justice to the common man of Pakistan and the military will protect its borders, will maintain its security and will ensure its survival and sovereignty.

Chapter 6

Conclusion & Recommendations

It is impossible for a state to get politically stable without proper separation of power between state political institutions. Individual sovereignty of each state institution is mandatory for the smooth running of state political system. Independent judiciary and efficient executive play the most important part in the democratic journey of a country. Executive, civilian or military, and judiciary are supposed to perform their constitutional roles independently without influencing each other. The judiciary is the custodian of the constitution and to ensure speedy justice to the citizen of a country, but on the other hand the executive implements the rules and regulations of a state, as well it enforces the judicial decisions.

Unfortunately it is evident that the executive and judiciary has always been unable to perform their constitutional roles without transcending each other's domain. Judiciary has always remained a subordinate institution under the powerful executive. There was a need to make the judiciary independent. The judges of the past did not play an active role in helping the judiciary get a stable position.

The role of Justice Ifkhar Chaudhary has been versatile in his judicial career. He did not resist the first round of executive pressure and took an oath under PCO, which resulted in the weakening of constitutional powers of judiciary. But a U turn was seen in his judgments when he took charge as a Chief Justice of Pakistan in 2005. He started taking actions against government, which was not acceptable for the executive. This resulted in a great conflict between the two state institutions. The conflict led to a massive movement in favor of independence and

restoration of judiciary This movement also helped to strengthen the democratic process in Pakistan

It can be concluded that Pakistan needs a balanced political and democratic system and seek to put in place durable political structure and processes The political situation is characterized by equilibrium between executive, judiciary and legislature, which are looking for to find their space in a democratic system There are some factors which needs consideration in this regard

- The judges must be loyal, faithful and sincere while performing their duty They should be fearless and bold during decision making so that they cannot be bowed their heads before any type of leadership (political and military) while doing justice Everyone should be equal citizen in the eye a judge
- The role of military in politics should be minimized so that they can protect the country from external threats Military must focus on defense rather than executive All the forces must be limited to the baric so that all the institutions can perform their own duties The military should fulfill the responsibility related to the state security and survival
- Rule of law must be ensured at all levels Constitutional Supremacy should be abided by all the institutions without the discrimination of executive, judiciary, military if someone (military man, terrorist groups, rebellions) does not respect constitutional supremacy, he must be liable to court as well to the people
- There must be accountability of executive as well as judiciary, so that the institutions can work properly due to the mechanism of check and balance The two should not misuse their powers and should not interfere in the matters of other organs by crossing their own domain

- The decisions must be made on the rule of transparency Merit must be ensured during all the decisions The merit should be followed for the appointments, promotions and retirements The culture of Nepotism and Red-tapism must be removed from executive and judiciary
- Election must be held freely and fairly so that the independent electoral can choose the capable and credible personalities and the real representative of the people can run the government system according to the will of people
- A democratic and liberal leadership should come on front so that the country can tackle the challenges related to absolutism and dictatorship The educated and qualified persons with democratic mentality, will hold the power in a different way in comparison with past The political and military leadership must respect public opinion and public mandate No one should have the right to work against the will of the public
- The democratic values (justice, equality brotherhood, free speech, harmony, education, respect for each other, rule of law, positive competition) must be promoted among the people through media, NGOs and by the political institutions as well

By following these recommendations, the country will move towards the path of peace and prosperity Executive-judiciary collaboration will prevail in Pakistan All the institutions will work in their own domain No institution will bring a failure to the democracy in the country The weak democratic government, with the help of military and judiciary, will be converted into mature democratic institution The independent judiciary will provide the justice to the common man of Pakistan Everyone will be equal before law and the judicial decisions will be enforced by the executive without the discrimination of institutions, leadership or any kind of power The

people of Pakistan like the developed state, without executive-judiciary clash will enjoy the utilities of mature- democratic environment

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