

**CONSTITUTIONALISM AND THE DILEMMA OF JUDICIAL  
AUTONOMY IN PAKISTAN: A CRITICAL ANALYSIS**

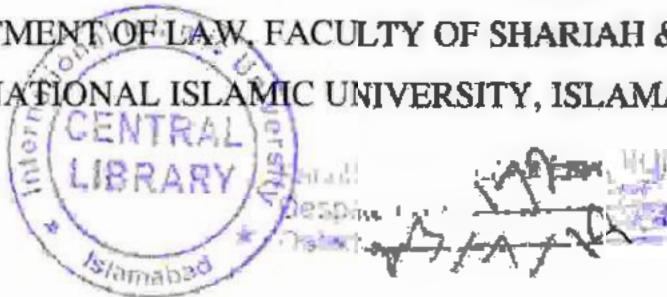


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بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

رَبُّ اشْرَحْ لِي صَدْرِي وَيُسِّرْ لِي أَمْرِي وَأَخْلَلْ عُقْدَةً مِنْ  
لِسَانِي يَفْقُهُوا قَوْلِي

O my Lord! Open for me my chest (grant me self-confidence, contentment, and boldness); Ease my task for me; And remove the impediment from my speech, so they may understand what I say.

[Surah Ta-Ha: 20:25-28]



### FINAL APPROVAL

This is to certify that we have gone through and evaluated the dissertation titled "**Constitutionalism and the Dilemma of Judicial Autonomy in Pakistan: A critical analysis**", submitted by Mr. Bakht Munir, a student of PHD (Law) under University Registration No. 22-SF/PHDLAW/F12, in partial fulfillment of the award of the degree of PHD (Law). This thesis fulfills the requirements in its core and quality for the award of the degree.

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To the countless unsung sons of the soil who went

**“Missing”**

in their own soil.

## DECLARATION

I, Bakht Munir, do hereby declare that this dissertation is and has never been presented in any other institution. I, moreover, declare that any secondary information used in this dissertation has been duly acknowledged.

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## ACRONYMS

AIR	All India Reporter
APC	All Parties Conference
ASBSC	Appellate Shariah Bench of the Supreme Court
CDA	Capital Development Authority
FDI	Foreign Direct Investment
FSC	Federal Shariah Court
HC	High Court
http	Hypertext Transfer Protocol
ICCPR	International Covenant on Civil and Political Rights
JCPR	Judicial Commission of Pakistan Rules
KP	Khyber Pakhtoonkhwa
LDA	Lahore Development Authority
LHC	Lahore High Court
Ltd.	Limited
MFLO	Muslim Family Laws Ordinance
NAB	National Accountability Bureau
OCAC	Oil Companies Advisory Committee
PCCR	Parliamentary Committee on Constitutional Reforms
PCO	Provisional Constitutional Order
PCr.LJ	Pakistan Criminal Law Journal
PHC	Peshawar High Court

PLD	Pakistan Law Decisions
PML (N)	Pakistan Muslim League Nawaz
PPO	Political Parties Order
PSM	Pakistan Steel Mills
PSO	Pakistan State Oil
PTCL	Pakistan Telecommunication Ltd.
Pvt.	Private
TLP	Tahreek-i-Labbaik Pakistan
ROPA	Representation of the Public Act
SC	Supreme Court
SCC	Supreme Court Cases
SCMR	Supreme Court Monthly Review
SHC	Sindh High Court
ST	Sunni Tehreek
TKN	Tehreeik-i-Khatam-i-Nabuwat
TLY	Tehreek-e-Labaik Ya Rasool Allah
US	United States
UDHR	Universal Declaration of Human Rights
UNCPC TO	United Nation Convention on Prevention of Crimes and Treatment of Offenders
v.	Verses
www	World Wide Web

## ACKNOWLEDGEMENT

Countless praises to Allah, the Almighty, the "Lord of the lords", the Creator of all Universe, the worthy of all praises, Who blessed me with courage and power to complete this dissertation. May the Lord's blessings, peace and greetings be upon the Prophet (SAWW), the mercy for all the beings, the revealer and the interpreter of Allah's will.

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## ABSTRACT

This work provides a twofold nature in relation to the law of Pakistan: firstly, constitutionalism being a broad public law concept applies to an analysis of the ongoing development and gradual maturing of this phenomenon in Pakistan. This endeavor helps place the thesis into a rich field of legal and law related literature that examines the trajectories of post-colonial countries in terms of their constitutional struggle and related developments. It provides a more descriptive framework that is useful in its own right as an orderly exposition of largely existing knowledge, ideally with updates on recent significant developments that major scholarly contributions from the earlier times did not yet included. Secondly, this thesis examines the dilemma of judicial activism, which is also referred to as public interest litigation. It endeavors to assess the extent to which judiciary of Pakistan may act as an autonomous entity that can rightfully set itself up as being somehow superior to the other constitutional entities, namely the legislature and the executive. However, the constitutional history of Pakistan elucidates that the role of military is an unavoidable additional stakeholder that impacts the judicial functioning in Pakistan.

Constitutionalism not only outlines the sources from where the government derives its authority but also highlights the parameters for the exercise of that power. Montesquieu says that every state performs mainly three functions: legislative, executive, and judicial. To avoid undue concentration of powers, these three functions need to be performed by different bodies. In case, where both legislative and executive functions are performed by one person or body, possibility may arise that tyrannical laws may be enacted by the senate or monarch and those laws be imposed in despotic manner. Similarly, there could be no liberty if judicial authority is not segregated from the legislative authority or the executive authority. In case where

judicial and legislative functions are performed by one body, life and liberty of the people would be at risk to arbitrary control because legislature would be the judge. In case where judicial and executive functions are performed by one body, the judge instead of interpretation of laws may behave with violence and oppression. So, when these three main functions: law making, execution, and adjudication are concentrated in one body that would lead to an untoward position.

In the constitutional history of Pakistan, the role of army is that of an unavoidable additional stakeholder and thus significantly impacts the position and role of judiciary. Throughout history, Pakistan has kept on shifting between military and fragile civilian rules where judiciary has often been used to legalize extra-constitutional steps especially during military regimes. The establishment of a democratic government with its organs having real independence fairly gives an assurance that judicial autonomy would thrive in future. The Superior Judiciary of Pakistan has facilitated the despotic regimes and its associated interests, which created institutional disequilibrium and consequently undermined representative institutions. After its restoration in March 2009, judiciary asserted an unprecedented autonomy not only from the military regime, but also extended the same attitude towards the civilian government and considered itself as a representative of the public will. Judiciary established a self-conception of public legitimacy and accountability.

Judiciary widened the scope of *suo motu* jurisdiction to a great extent and transgressed its powers of judicial review for so many times, which grappled the whole nation, putting them in a state of disbelief of the existence of an elected democracy. Excessive judicial activism and judicial involvement in every matter of the executive can damage the very existence of other state organs. In order to keep the democratic transition on a positive track, judiciary should not intervene excessively in

the domain of other state organs. In terms of decision-making, state institutions gives an impression that the whole idea of checks and balances has been compromised. This dictatorial dominance and institutional imbalance has never remained completely unchallenged. Pakistan's experience with judiciary suggests a rational compromise between judicial autonomy and its constraints. Maximum judicial autonomy, without any constraint, would certainly create impediments to the smooth-functioning of representative institutions and may consequently further strengthen the military and its affiliated interests. This current shift of democratic regime inevitably entails institutions with strong governing capacities, in order to rein in the ambitious military and to uphold the spirit of constitutionalism.

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## **BRIEF SUMMARY OF THE CHAPTERS**

### **Chapter No. 01**

First Chapter introduces the concept of constitutionalism, judicial activism, and highlights how these concepts are interlinked. It provides an account of Pakistan's struggle in its constitutional development. Objects and significance of the research have been elucidated at length and the co-relation between constitutionalism and judicial autonomy is fairly established. Another segment of this chapter provides statement of the research problems and puts forward questions corresponding to every chapter, in order to theorize the overall objectives of the thesis. Another section of this chapter provides research hypothesis and agenda for conducting the research. One of the most important sections of this chapter is review of the present literature, which contributes examination of the present literary work from the indigenous and foreign scholarship. This segment provides a critical appreciation to the existing literature and justifies further research in the proposed area. Last segment of this chapter elaborates limitations and de-limitations of the research. Keeping in view scope and constraints, both in terms of resources and time, this segments circumscribes the study to comparative analysis of the US and Pakistan where the US constitutional concept of separation of powers and system of checks and balances is comparatively examined with the trichotomy of powers in Pakistan.

### **Chapter No. 02**

Second Chapter examines the philosophical study and historical evolution of constitutionalism and judicial activism. For understanding the concept of constitutionalism, it has been divided into two broad categories and provides justifications of how it imposes restrictions on the governments. Another segment of the chapter provides literature regarding the nature and philosophy of sovereignty. It

provides an account of the Islamic and other perceptions of sovereignty. This segment also provides critical appreciation to the literary work of Thomas Hobbes and John Locke regarding the concept of sovereignty. The chapter also examines the historical genesis of the concept of judicial activism and provides literature regarding the evolution of the concept in the USA and Pakistan. This segment further examines application of the Islamic law through judiciary. Last segment of the chapter provides test of judicial activism and explains the extent to which judicial activism is indispensable and how excessive activism adversely impacts the constitutional development in Pakistan.

### **Chapter No. 03**

Third Chapter examines trichotomy of powers and apprehensions of institutional disequilibrium where any of the state organs deviates from its constitutional role or encroaches upon the domain of other state organs. It highlights how judiciary was forced by Military and its affiliates to facilitate and validate extraconstitutional actions at the expense of civilian government and its own autonomy. This segment also explores Military's inclination towards the viceregal form of government, emphasizing on the presidential form of government, against the parliamentary form of government. It examines how Military transforms and preserves its authority from its direct rule to civilian rule. The chapter also elucidates consequences of Military's transformative preservation on judicial autonomy and constitutionalism. Another important segment of the chapter investigates the historical genesis and the evolution of the idea regarding the separation of powers and the system of checks and balances in the light of formalist and functionalist approaches. The chapter further analyses the trichotomy of power in Pakistan's perspective and

highlights the inevitable role of Military as an additional stakeholder in the constitutional development in Pakistan. This segment also presents an account of Military courts, justification for their establishment, procedure being adopted, its extension, its impacts on the fair trial, and compatibility with the domestic and internal standards.

#### **Chapter No. 04**

This Chapter examines the role of the judiciary in stabilization and destabilization of the democratic institutions. It divides the role of judiciary in two broad categories in the constitutional development of Pakistan: critical analysis of the cases where judiciary was forced to compromise its own autonomy, validated the extraconstitutional actions, and justified military interventions at the cost of civilian governments. It highlights how judicial activism has been manipulated and used for the interest of one political party against the interest of the other political parties. The second category examines the cases where judiciary invalidated the extraconstitutional actions, reinforced the civilian government, and ensured its own autonomy from the military and its associates. The chapter also provides a test for judicial review, in order to explicate the extent to which the judicial activism has been justified and to which extent the excessive use of activism could create hindrance for the other state organs. Last segment of the chapter highlights that how the executive responded to the judicial populism after realizing that excessive judicial activism creates obstacles in the functioning of democratic institutions.

## **Chapter No. 05**

This Chapter examines constitutional safeguards to judicial activism and highlights that how Judiciary and Parliament reversed extra-constitutionalism. This chapter also explicates Parliament's commitment of putting minimum restriction on judiciary for striking a fair balance between judicial autonomy and its constraints. It elucidates evolution of judicial autonomy and elaborates Parliament's constitutional efforts towards institutionalization of judges' appointment, in order to maintain its modest control on judiciary. The chapter provides an analysis of pre-eighteenth, eighteenth, and post-eighteenth constitutional amendments regarding judicial appointments and examines how judiciary responded to Parliament for ensuring its autonomy. This segment also articulates different means for balancing and rebalancing of judicial autonomy and elaborates how judiciary opted for the basic structure theory. Last segment of the chapter examines the Supreme Court's viewpoint regarding judicial autonomy, which leads to confrontation with Parliament by various means: judicial entrenchment in parliamentary affairs, taking cognizance of core political issues, judiciary's perception regarding representation of the public will and its public accountability instead of Parliament.

## **Chapter No. 06**

This Chapter articulates conclusion of the thesis. Despite the fact that every chapter has been properly concluded, this chapter provides a thorough analysis of the research undertaken. This segment concludes various concepts and issues pertaining to constitutionalism and its associated challenges in the constitutional development in Pakistan. This chapter provides an overview of constitutionalism, trichotomy of powers, and inevitability of judicial impartiality. This segment also summarizes role of Military as an unavoidable additional stakeholder in the constitutional development.

of Pakistan and recapitulates efforts of judiciary and Parliament for ensuring their autonomy and to counter the pressure from the Military and its affiliates. This segment also encapsulates how Parliament strived to impose restrictions on Judiciary, in order to maintain a fair balance between judicial autonomy and its constraints. It also gives an account of how a new journey of confrontation between judiciary and Parliament has been embarked upon and offers that how the prevalent confrontation can be turned into opportunity to reinforce judicial autonomy and sanctity of democratic institutions.

## **Chapter No. 07**

This Chapter places certain suggestions for advancing the concept of constitutionalism in Pakistan and provides submissions for ensuring autonomy of democratic institutions without compromising the impartiality and integrity of Judiciary. This chapter has been categorized into three broad heads: institutional reforms, other reforms, and future research. In institutional reforms, suggestions regarding the challenges and how to bring about reforms in the Judiciary, the Executive, and Parliament as institutions have been incorporated. The judicial reforms suggest that how judiciary could improvise its working mechanism and discourage the excessive use of *suo motu* actions in the executive and core political matters without deviating from its constitutional role. The executive reforms explicate the prevalent challenges in the bureaucratic fabric and suggest how to materialize and improvise the institutional structure of the executive. The Parliamentary reforms highlight how the political instability and frequent regime-shift adversely impacts democratic institutions and suggests how to rollback Military's transformative preservation in the civilian governments. This Chapter also articulates certain other reforms that could

ultimately leave positive impacts on the consolidation of democracy and constitutionalism in Pakistan: public awareness and education, the role of press and media, the democratization of the institutions, compliance to oath and code of conduct, the policy-making and public inspirations, strengthening and reposing trust on the representative institutions vis-à-vis the Military, the democratization of the constitutional functioning, and self-realization of constraints.

## Chapter No. 1

### INTRODUCTION

Constitutionalism is a concept that prescribes the sources from where the governments derive their powers and outlines the limitations and boundaries within which those powers are to be exercised.<sup>1</sup> It is not just a normative theory about the forms and procedure of governance rather it is a mechanism of controlling, limiting, and transferring of the state's power.<sup>2</sup> This concept helps establishing a democratic state in which all the state powers are exercised by three organs: the legislature, the executive and the judiciary. These organs, apart from exercising their inherent powers, maintain equilibrium by a process of checks and balances. This democratic state is unlike a police state where government's branches are controlled by a despotic regime such as North Korea.

In western democracies, each organ's sphere of authority has been marked by a continuous process of evolution. Though in newly emerging democracies or the democracies struggling to find a foothold, the jurisdiction of these organs is often blurred because these democracies are passing through an evolutionary process where it will take time that all organs' jurisdiction is clearly marked. These set of powers conferred and limitations imposed on the governments emanate from a body of principles and standards called constitution that represent the will of people.

Every government has a constitution, which is comprised of rules prescribing that how governmental authority is created, structured, and circumscribed. Constitution is considered as a living organism that adapts itself according to the inspiration and requirements of the people. Primarily, constitution deals with

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<sup>1</sup>De Smith, Stanley A. *Constitutional and administrative law*. (Penguin books, 1977)

<sup>2</sup>Waldron, Jeremy. "Constitutionalism: A skeptical view." (2012).

delegation, division, and restrictions of authority.<sup>3</sup> Even under the most despotic regimes, constitutions do exist, which maybe different from that of a republican system of government that promotes the concept of separation of powers. In order to run the affairs of a state, even the despotic regimes have constitutions, which are comprised of legal norms and procedure. In absence of such legal norms and procedure, the constitution may be considered as nominal rather than normative constitution and it may be referred as a state having constitution without constitutionalism.

The idea of constitutionalism can be linked with the theories of John Locke and founders of the American Republics who believed that there should be limitations on the governmental bodies and they must comply with those limitations while exercising their authority.<sup>4</sup> The concept of constitutionalism further explains that a government does not assume power by itself rather this power is derived from a set of written laws. The governments so formed are opposite to the governments in monarchies, totalitarian or dictatorial states where power is concentrated in one authority having absolute command and there always exists the likelihood of that power being misused. As Lord Acton's famous dictum was quoted by Montesquieu, 'power corrupts and absolute power corrupts absolutely'.<sup>5</sup> In a system, where power is derived from the personal whims of a person or from the will of group of people nominated by a single person, the prospects of this power being misused can never be ruled out.<sup>6</sup>

In the last half of the 20<sup>th</sup> century, the idea of constitutionalism was well established in the western democracies and the same was being adopted and

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<sup>3</sup> De Smith, Stanley A. *Constitutional and administrative law*. (Penguin books, 1977): 6.

<sup>4</sup> Waluchow, Wil. "Constitutionalism." (2001).

<sup>5</sup> Kingston, Rebecca, ed. *Montesquieu and his Legacy*. (SUNY Press, 2008): 99.

<sup>6</sup> Freund, Paul Abraham. *Constitutional Law: Cases and Other Problems. Supplement*. Little, (Brown, 1977): 224.

experimented in third world countries. All the nations in the third world seemed to have consensus that there should be a supreme document having the essence of their people's inspirations. Those supreme documents embody the well-established constitutional norms, such as the creation of the state organs, their powers, mutual checks and balances, in order to provide for a written agreement of the state and its subjects. This, in turn, provides a touchstone for the judicial organ to make every organ act within the limits prescribed by that very document but none other.<sup>7</sup>

The constitutional history of Pakistan provides an account of troubles over agreeing on a viable Constitution and on methods of how to make this system work in practical life of the nation. In all this transitional phase of constitutional development, military played its role as an unavoidable additional stakeholder that directly and indirectly affected the judicial autonomy. The real dilemma of judicial autonomy in Pakistan is the shifting of the superior court's jurisprudential viewpoint on various occasions since the inception of Pakistan. The evolution of this judicial jurisprudence started with the famous *Maulvi Tamizuddin Khan case*<sup>8</sup> where the Court validated dissolution of a legitimate assembly creating a sorry precedent in the history of Pakistan. As a result, *Usif Patel and other v. Crown*<sup>9</sup>, the Court went more worst and struck down a number of governmental actions. The Constitution of 1956 could not last for long and the Martial Law was proclaimed in 1958. Ayub Khan, after dissolving the constitutionally elected assemblies, took the charge as a Chief Martial Law Administrator. His act of dissolution of assemblies was validated by the Court in *the State v. Dosso and Others*<sup>10</sup> case, where the Court observed that one of the

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<sup>7</sup> Alexander, Larry, ed. *Constitutionalism: philosophical foundations*. (Cambridge University Press 2001): 16.

<sup>8</sup> *Federation of Pakistan and others v. Maulvi Tamizuddin Khan*, PLD 240 (PC 1955).

<sup>9</sup> PLD 46 (SC 1957).

<sup>10</sup> PLD 533 (SC 1958).

internationally recognized modes of changing a constitution is the victorious revolution, which may also be termed as successful coup.

In 1969, due to abrogation of 1962 constitution, the Martial Law was imposed again which was challenged in *Miss Asma Jilani v. Government of the Punjab*<sup>11</sup> case, where the Court invalidated transfer of power from Ayub Khan to Yahya Khan. Later on, Mr. Zulfiqar Ali Bhutto who was first Civil Martial Law Administrator removed the Martial Law and permitted the assemblies to continue work. After fourteen years of the despotic regime, the country again started its journey on the road of democracy. Afterwards, the two army takeovers of 1977 and 1999 and the six civilian administrations, Junejo, three PPP and two PML-N administrations happened to rule the country till 1999. In order to circumvent further military interference, Article 6<sup>12</sup>, creating an offence of high treason for the abrogation of the constitution, was introduced. Despite of the incorporation of the constitutional provision as a precautionary measure, martial law was again proclaimed in 1977. This imposition of the Martial Law was challenged in the *Begum Nusrat Bhutto v. Chief of Army Staff*<sup>13</sup> case. The Court while relying on the so called doctrine of the state necessity dismissed the petition on the ground that it was not maintainable. The Court upheld the military regime and consequently derailed democratic progress for more than a decade. On October 12, 1999, once again the civil government was invaded by the military regime, which was accordingly challenged in *Zafar Ali Shah v. General Pervaiz Musharraf*<sup>14</sup>. The Supreme Court again relied on the doctrine of state necessity and upheld military intervention. Nonetheless, the Court directed that within the period of three years, the general elections should be held and the authority should be

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<sup>11</sup> PLD 786 (Lahore 1969).

<sup>12</sup> Article 6 of the Constitution of Pakistan, 1973.

<sup>13</sup> PLD 657 (SC 1977).

<sup>14</sup> PLD 869 (SC 2000).

transferred to the elected representatives. The Court further added that the basic essential features of the Constitution would not be changed by any means, which was evident in *Sayyed Yousaf Raza Gailani v. the Registrar of the Supreme Court*<sup>15</sup>, where the Court showed significant development towards the constitutionalism. The Court emphasized that Constitution be interpreted in accordance with constitutionalism, in order to ensure equilibrium among state organs.

Recently, a preposition was put before the Supreme Court of Pakistan regarding the limitation on the authority of the government, in order to amend the Constitution and power of the Court regarding striking down any such amendment. The Court held that from very beginning there is a persistent view that the courts cannot invalidate any constitutional provision on the touchstone that it is violative of any essential feature of the Constitution. Hence, the doctrine of basic structure prevalent in India was completely rejected in Pakistan. Nevertheless, the Court can review whether or not proper procedure for initiating a constitutional amendment was followed and its power to review didn't extend to the substantive part of the amendment.<sup>16</sup> The government exerted constitutional efforts in form of the 18<sup>th</sup> Constitutional Amendment to regulate and control the judicial organ. However, the Supreme Court in response to the 18th Constitutional Amendment not only reviewed a unanimously adopted amendment, but also directed the government to revise the amendment in the light of its recommendations. A short revisiting of the constitutional history shows that Judiciary in Pakistan kept on shifting its position,

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<sup>15</sup> PLD 466 (SC 2012).

<sup>16</sup> Constitution Petition Nos.12, 13, 18, 20-22, 31, 35-36, 39, 40, 42-44 OF 2010 and C.M.A. NO.1859 of 2010 in Constitution Petition No.40 OF 2010, and Civil Petition No.1901 OF 2010; and H.R.C.NO. 22753-K OF 2010, and Constitution Petition Nos. 99 & 100 OF 2014 and Constitution Petition Nos. 2, 4 TO 13, 23-24 OF 2015. (Petitions under the Article 184(3) of the Constitution of Islamic Republic of Pakistan, 1973)

sometimes it backed the extra-constitutional steps and sometimes it stood right behind the democratic institutions of Pakistan.

### **1.1. OBJECTIVES AND SIGNIFICANCE OF THE STUDY**

The ultimate objective of this research is to provide a theoretical framework that how constitutionalism and judicial autonomy are interlinked. This research investigates the philosophy and nature of constitutionalism and its Islamic perception. The proposed research investigates various restraints and theories of sovereignty in order to conceptualize the idea of constitutionalism and its application in Pakistan. Furthermore, trichotomy of powers and system of checks and balances for judicial autonomy is critically analyzed. Throughout the constitutional history of Pakistan, military played its role as an inevitable stakeholder and remained an integral part of the constitutional development. This work also examines that how judiciary has been used to justify the extra-constitutional acts of military. Furthermore, the constitutional scope of Article 184(3) and 199 is elaborated and jurisprudence developed by the Superior Courts has been examined, in order to ensure that how impartiality and integrity of judiciary could be achieved.

This research examines how judiciary could play its role in stabilization of the democratic system in Pakistan. This work highlights constitutional safeguards for judicial activism with the help of constitutional mechanism such as invalidation of extra constitutionalism, constitutional amendments, and judicial accountability. Democracies like Pakistan, where democratic norms are not clearly articulated and the state organs are not certain about their jurisdictional circles, this lack of jurisdictional demarcations can lead to a power struggle creating prospects of disequilibrium in the state organs. In maintaining the constitutional model of trichotomy, judiciary

performs a considerable role. Nonetheless, excessive interference in the affairs of other organs can create confrontation among the state organs.

Keeping in view the US model of separation of powers and systems of checks and balances, a rational compromise has been drawn among the state organs for their proper functioning and it has been elucidated that how judicial organ can be fully independent from the influence of the autocratic and extra-constitutional acts of the government and military coups. It is admitted fact that judicial autonomy is inevitable for consolidation of pure democratic and constitutional institutions, ensuring trichotomy of powers and system of checks and balances. However, an uncontrolled judicial autonomy could create hindrance in the smooth functioning of other state organs, creating prospects of interbranch conflicts.

## **1.2. STATEMENT OF THE RESEARCH PROBLEMS**

The research undertaken intends to encounter and look at the given Questions;

- 1.2.1. What is constitutionalism and how this concept was first came to fore in legal and political debates? How constitutionalism is linked with other constitutional and political debates especially sovereignty and judicial activism? How the idea of constitutionalism is evolved in Pakistan keeping in view constitutional and political history of Pakistan?
- 1.2.2. What are the constraints of constitutionalism in various political systems with special reference to comparative analysis of US political system and political system of Pakistan? What are the different debates regarding sovereignty and models of governments as put forwarded by Western as well as Muslim jurists and political theorists?

- 1.2.3. How the political theorist apprehends misuse of power when it is concentrated in single hand or institution? How this apprehension was addressed by the fathers of the US Constitution by floating an ancient idea, with novel configuration, the idea of separation of powers? How the concept of separation of powers adopted and developed taking jolts throughout political and constitutional history of Pakistan?
- 1.2.4. How the concept of separation of powers necessitated a competing and balancing concept of checks and balances that ultimately originated another novel idea of Judicial Review? What are the bounds beyond which Judicial Review takes the form of judicial activism? How the term judicial activism is being interpreted in modern and contemporary constitutional scenario? How judicial activism in Pakistan has its roots back in the concept of judicial review in the US? How judicial activism is considered a double-edged weapon in Pakistan keeping in view functioning of military and executive?
- 1.2.5. How constitutionalism faces various threats in Pakistan keeping in view extra-constitutional steps taken by judiciary? How military and its associated interests hindered and choked at times constitutionalism in Pakistan? How superior judiciary of Pakistan kept jolting constitutionalism at times by validating military's extra-constitutional steps and at times by circumscribing military's despotic and extra-constitutional activities?
- 1.2.6. What meaningful measures can be taken to materialize the dream of balanced judicial autonomy that would stabilize democratize institutions and would ensure rule of law in Pakistan?

### **1.3. RESEARCH HYPOTHESIS**

Keeping in view the nature and vitality of the research, this work could be classified into twofold hypothesis so as to draw a clear cut agenda of the research:

- 1.3.1. The judicial autonomy is inevitable for the consolidation of pure democratic and constitutional institutions with its real independence ensuring the concept of trichotomy of powers as well as the concept of checks and balances.
- 1.3.2. The excessive judicial autonomy leads to judicial activism, which may hinder the smooth functioning of the other state organs that could ultimately lead to tussle of power gain among the state organs.

### **1.4. REVIEW OF THE PRESENT LITERATURE**

Despite generous scholarly contribution at international level in this field, the fact remains that no substantial contribution has been made regarding constitutionalism in Pakistan vis-à-vis Islamic notions, role of judiciary, and dominance of military. Keeping in view the spirit of constitutionalism, investigation to the changing trends in the judicial organ in facilitating and justifying the extra constitutional acts of the military in both the civil and military regimes have been made. In the light of constitutional provisions and case laws, a jurisdictional line has been drawn among the state organs for their proper functioning, avoiding unnecessary interference in the jurisdictional circle of other state organs. The literary work of foreign and ingenious scholars in the proposed area of research is noteworthy.

Jon D. Michaels<sup>17</sup> examined the rise and fall of the separation of powers, the concept of tripartite government, and highlighted Montesquieu doctrine with the prospect of administrative agencies. The first two relevant segments of this research article have been considered to develop arguments in Pakistan's prospect.

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<sup>17</sup> Michaels, Jon D. "An Enduring, Evolving Separation of Powers." *Colgate L. Rev.* 115 (2015).

The *International Commission of Jurists*<sup>18</sup> published report on the establishment of military courts in Pakistan. The report thoroughly investigated that the trials conducted by military courts are not complied with the international standards set forth for fair trial but the trials conducted by military courts in Pakistan are against the fundamental rights guaranteed under the Constitution of Pakistan. The Commission examined the nature of offences which can be tried by military courts and critically investigated the 21<sup>st</sup> Constitutional Amendment constitutionalizing military courts for two years. The Commission also compared these courts with the international standards and previous response of the Supreme Court regarding the establishment of these courts. The report also pointed out whether there is any tendency of military courts in the South Asia and exemplified India, Nepal, and Bangladesh. A thorough examination of this report highlighted various issues associated with the trials conducted by military courts in Pakistan.

The researcher critically investigated the military's role and how its influences the judicial decision, in order to validate its extraconstitutional actions. A historical overview of the military courts and its associated implications to the trichotomy of powers with special reference to the civilian courts has been made. Twenty-third Constitutional Amendment further extended functioning of these courts. Certain suggestions have been given to regulate these military courts, in order to bring them in line with the international and domestic standards, ensuring right to fair trial. This research also stressed on bringing these courts under the preview and hierarchy of the civilian judicial fabric. Parallel judicial systems can deprive an individual from right to fair trial and can also create public distrust on the civilian courts for their failure in dispensation of justice.

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<sup>18</sup> The International Commission of Jurists, *Pakistan Military Trials for Civilians Questions and Answers*, (April 2015).

Another substantial contribution is made by *Muhammad Raheem Awan*<sup>19</sup>, who examined the scope of the judicial activism affecting the commercial side. This research, however, focused on the philosophy of constitutionalism and its affiliated concepts discouraging institutional disequilibrium. He thoroughly investigated the role of judiciary in the transitional period of democracy. However, some very significant legal developments have taken place afterwards that needs critical appreciation. The researcher examines both commercial and democratic aspects of the judicial activism and endeavors to incorporate the latest legal and constitutional developments.

*Ghulam Ghous and Zahid Bashir Anjum*<sup>20</sup> presented various grounds that led to the lack of rule of law and democratic norms. This article highlighted that how judiciary shares common political interest with the other organs, how it is dependent on the other state organs for its resources, capacity building, and institutional development. The authors demonstrated that how judiciary has not yet achieved a durable institutional autonomy, ensuring its sovereignty from other state institutions and political actors. The authors also explained that most of its autonomy is due to the changes in the social and political fabric and not due to its own struggle or assertion. This article has been examined to analyze reasons why judiciary could not achieve real independence and what are the impediments to its autonomy.

*Anil Kalhan*<sup>21</sup>, in his Article, gave a brief literature about the constitutional changes in the tussle between civil and military regimes and judicial independence

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<sup>19</sup> Muhammad Raheem Awan, "Judicial activism in Pakistan in Commercial and Constitutional Matters: Let Justice be Done Though the Heavens Fall." University of Bedfordshire. United Kingdom. "Journal of International Criminal Justice, Research" vol.1, (2014).

<sup>20</sup> Ghous, Ghulam, and Zahid Bashir Anjum. "Judiciary and Democratic Process in Pakistan: A Study of Supreme Court Judgments (1988-2000), Asian Journal of Humanities and Social Sciences, vol. 2, No. 3 (2014).

<sup>21</sup> Kalhan, Anil. "Gray Zone Constitutionalism and the Dilemma of Judicial Independence in Pakistan." (2013).

within the gray zone by analyzing developments taken place in Pakistan before 2013. The authors gave a comparative analysis with the Arab world highlighting the Arab Spring. Keeping in view the latest developments, the researcher critically investigates changes taken place after 2013 such as constitutional amendments as well as establishment of military courts. In this perspective, a comparative analysis has been made with the USA.

*Osama Siddique*<sup>22</sup> contributed literature regarding implications of speedy justice and how it departs the country from its legal system, keeping in view the institutional and the sociological factors. The author, however, could not associate constitutionalism with the judicial autonomy. Therefore, conceptualization of constitutionalism and investigation of judiciary's role in stabilization of the state organs has been made in this thesis.

*Syeda Saima Shabbir*<sup>23</sup> contributed literature on the judicial activism with special reference to Pakistan. The author used the term judicial activism as a neologism for judicial review and gave historical background of the latter in the UK, the USA, India, and Pakistan. The author contributed literature regarding the leading case law development in the democratic transition in Pakistan and thereby highlighted the role of the judiciary. The author presented a case law study regarding the public interest litigation and attributed the same with the independence of judiciary. The author appreciated *suo motu* actions of the superior courts after restoration of judiciary in 2009. This article helped analyze the judicial role in the evolution of democracy in Pakistan and critically investigates *suo motu* actions, leaving the apprehension of adverse impacts on the executive functioning and trichotomy of powers.

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<sup>22</sup> Siddique, Osama. *Pakistan's experience with formal law: an alien justice*. (Cambridge university press, 2013).

<sup>23</sup> Shabbir, Syeda Saima. "Judicial Activism Shaping the Future of Pakistan." (2013).

*Muhammad Rahim Awan*<sup>24</sup> contributed an article regarding judicial activism in Pakistan, which mainly focuses on impacts of judicial activism on commercial and constitutional matters. The author highlighted the increasing scope of judicial activism, particularly, after 2006. The author examined the expansion of the public interest litigations and articulated that how the judiciary is taking cognizance of the matters covering every aspect of life. The author also highlighted how the courts' cognizance could adversely affect government's financial interests, especially, in the matters involving foreign investments. This article helps investigating how the excessive use of *suo motu* actions could adversely affect international obligations leaving drastic impacts on the country's economy. The researcher investigated how both monetary and democratic government's spheres are closely associated with judicial autonomy and judicial activism.

Another article authored by *Jeremy Waldron*<sup>25</sup> presented a worth-reading material on constitutionalism. No literature, however, regarding Pakistan is contributed so this research examined the concept of sovereignty in the light of Islamic and other perceptions and developed arguments in Pakistan's perspective. Challenges to the democratic transition in the light of the superior courts' judgments elucidating constitutionalism and trichotomy of powers have been examined.

*Muhammad Nasrullah Virk*<sup>26</sup> contributed literature regarding the courts' invalidation of dissolution of elected governments on the pretext of necessity doctrine. The author, in his research article, investigated seven constitutional cases from various martial law regimes and investigated how the validation of extraconstitutional actions affected the trichotomy of the legislature, the executive, and the judiciary. In

<sup>24</sup> Muhammad Raheem Awan. "Judicial Activism in Pakistan in Commercial and Constitutional Matters: Let Justice be Done though the Heavens Fall", University of Bedfordshire, United Kingdom, (December 2013)

<sup>25</sup> Waldron, Jeremy. "Constitutionalism: A Skeptical View." (2012).

<sup>26</sup> Virk, Muhammad Nasrullah. "Doctrine of Necessity Application in Pakistan." (2012).

order to develop the debate regarding judiciary's role in the democratization, these cases have been consulted.

*Iran Khalid*<sup>27</sup> examined the consequences of judiciary's failure to invalidate extraconstitutional actions that ultimately created concerns regarding judicial autonomy in Pakistan. The author presented a brief literature regarding Pakistan's struggle for democracy and its constitutional and political experiences. The author associated political stability with judicial autonomy, and focused on the inevitability of institutional sovereignty, in order to overcome further political instability in Pakistan. This article helped associating democratic and political stability with judicial autonomy.

*Mohammad Waseem*<sup>28</sup> focused on executive and legislative rifts and post-Musharraf judicialization of politics. The author highlighted that how the tussle between judiciary and executive led to the speculation about the collapse of civilian government. The author also provided a brief judicial review with reference to excessive judicial authority, how the judiciary sought veto power over the issue of judges' appointment after 18<sup>th</sup> amendment to the constitution, and how it denied the right of oversight to the government. The author also examined that how judiciary, through *suo motu* actions, undermined the executive authority. This article was consulted for advancing the debate regarding judicial activism and its impacts on democratic system, how it can narrow down functional space for the executive, and how excessive judicial activism can contribute to public distrust of the elected representatives.

<sup>27</sup> Khalid, Iran. "Role of Judiciary in the Evolvement of Democracy in Pakistan." *Journal of Political Studies* 19, no. 2 (2012).

<sup>28</sup> Waseem, Mohammad. "Judging democracy in Pakistan: conflict between the executive and judiciary." *Contemporary South Asia*, vol. 20, no. 1 (2012).

*Dr. Aman Ullah*<sup>29</sup> made a comparative analysis regarding judicial activism and differentiated the concept between India and Pakistan. The author critically observed that the judicial activism in India is an absolute divergence from the constitutional norms endorsing the idea of separation of powers and limited jurisdiction of the Supreme Court. Conversely, the Supreme Court of Pakistan consistently denies reviewing constitutional amendments affecting fundamental rights on the ground of Parliament being a proper forum for addressing political questions instead of judiciary. This article helped provide literature regarding judicial autonomy and interlinked constitutionalism with judicial autonomy.

*Tasneem Sultana*<sup>30</sup> elucidates the concept of separation of powers and categorized how these powers are distributed. The author briefly examines how the separation of powers emerged in Pakistan and what are the prevalent challenges to the trichotomy of powers. The author highlighted the role of the army and judicial response to the military interventions. The author also examines how judiciary was manipulated by military and what are the constitutional promises which can overcome the dilemma of viceregal state and how to convert it into a real welfare state. This article has been examined for analyzing the historical developments of the democratic norms in Pakistan, how military can be forbear from further intervention, and the necessity to diminish military's entrenched authority into the civilian rule.

Another significant contribution to the proposed topic has been made by *Shoaib A. Ghias*<sup>31</sup>. The author gives a brief account of the authoritarian regime of Musharraf and elucidates how the Supreme Court of Pakistan legitimized the regime

<sup>29</sup> Dr. Aman Ullah, *Judicial Activism and Human Rights in Pakistan and India: Right to Life*. (VDM Publishing, 2011).

<sup>30</sup> Tasneem Sultana. "Montesquieu's Doctrine of Separation of Powers: A Case Study of Pakistan." *Journal of European Studies*. (Jan. 2011)

<sup>31</sup> Ghias, Shoaib A. "Miscarriage of chief justice: judicial power and the legal complex in Pakistan under Musharraf." *Law & Social Inquiry* 33, no. 4 (2010): 985-1022.

and its extra-constitutional acts. The author categorically explains the expectations of regime towards judiciary and the transition of a pro-regime judiciary to political liberalization. The author briefly highlights efforts towards restoration of judiciary and factors that led to the strengthening of judiciary against the despotic regime. Further, this research examines how judiciary challenged the authority of regime by considering privatization of public enterprises, urban development, and missing persons' cases. The author also presents a thorough discussion on the mobilization of the legal fraternity for the restoration of judiciary. The researcher examined this article and highlighted that how judiciary circumscribed military's role and provided literature regarding latest developments taking place in the legal and constitutional spheres of the country.

*Jack M. Balkin*<sup>32</sup>, in his work conceptualized originalism, which deals with the basic architecture of the government, the politicization of politics, and the mechanism for framing the constitution. This is a good endeavor to clarify how living constitutionalism helps institutional infrastructure of the government and the application of the constitutional provisions and its associated principles. The author, however, has not given any reference to Pakistan so the researcher comparatively analyzes the concept of constitutionalism with special reference to Pakistan.

In another article, *Nasreen Akhtar*<sup>33</sup> gave a brief analysis of the democracy highlighting the scope of sovereignty and the Constitution in Pakistan, with special reference to Islam. This article has been consulted for conceptualization of the idea of constitutionalism in the light of Islamic and other perceptions.

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<sup>32</sup> Balkin, Jack M. "Framework originalism and the living constitution." *Nw. UL Rev.* 103 (2009): 549.

<sup>33</sup> Akhtar, Nasreen. "Polarized politics: the challenge of democracy in Pakistan." *International Journal on World Peace* (2009): 31-63.

*Kermit Roosevelt*<sup>34</sup> in his addition to the debate over judicial activism offers elegantly regarding competing ideas: one group argues that constitution is immutable and cannot be subjected to any change. The other group criticizes this viewpoint and believes constitution to be a living document that needs reinterpretation, keeping in view new socio-cultural norms so as to keep the constitutional evolution on right track. The author uses simple language and convincing arguments, supported by compelling examples, to elaborate that how both qualities of a constant and organic document co-exists in the constitution. In the recent history, increasing arguments about judicial behavior have been witnessed that specifically criticizes the superior courts' judgments reflecting political priorities instead of interpretation and implementation of the Constitution. The author while taking an impartial approach examines controversial decisions through modern approach of constitutional interpretation. The author analysis the role and effects of the courts in deciding constitutional matters and presents a theoretical framework that how courts can create a mechanism for due implementation of constitutional provisions. By utilizing this model, the author examines that whether or not a decision is legitimate.

Another considerable work has been contributed by *Justice (R) Fazal Karim*<sup>35</sup>, which highlights judicial activism in Pakistan. His work provides literature regarding various grounds and leading principles regarding judicial review of the administrative actions. The author also incorporated literature regarding the writ jurisdiction of superior courts. This work helped highlight the concept of judicial activism and how it is evolved in Pakistan while making its comparison with the USA. Keeping in view the spirit of constitutionalism, the researcher provides a

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<sup>34</sup> Roosevelt, Kermit. *The myth of judicial activism: making sense of Supreme Court decisions*. (Yale University Press, 2008).

<sup>35</sup> Karim, Fazal. *Judicial review of public actions*. (Pakistan Law House, 2006): 1310 – 1324.

theoretical framework for ensuring judicial autonomy and its role in developing the philosophical concept of constitutionalism.

*Hamid Khan*,<sup>36</sup> in his book gave a brief account of legal and political developments that have taken place in Pakistan. The author contributed literature regarding Pakistan's struggle for constitutionalism and judicial autonomy. The author provided a detailed analysis of constitutional cases whereby Judiciary validated extraconstitutional actions and legalized military interventions. The author also provided cases whereby Judiciary backed and reinforced the civilian governments. Nonetheless, after 2009, very significant legal and constitutional developments have taken place that needs critical appreciation. The researcher provides literature regarding the constitutionalism, role of the judiciary, military role in the democratic transition and contributes literature regarding legal, constitutional and political developments after 2009.

*Keenan D. Kmiec*<sup>37</sup> contributed significantly to the historical background and terminology of the term "Judicial Activism". This paper investigated the first use of this term in scholarly writings, judicial opinions, and provided definitions of the term. This research article also provided statistical information about the terminology of judicial activism and how increasingly it is creating room for itself in legal jurisprudence. In order to introduce the concept and to trace origin of judicial activism, this article was very productive.

*Imtiaz Omar*<sup>38</sup> in his work demonstrated Constitutional norms circumscribing scope of the executive for derogation of the individuals' rights during imposition of emergency in the light of Judiciary being a controlling mechanism, in order to make

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<sup>36</sup> Khan, Hamid. *Constitutional and political history of Pakistan*. (Oxford University Press, USA, 2005).

<sup>37</sup> Kmiec, Keenan D. "The origin and current meanings of judicial activism." *Cal. L. Rev.* 92 (2004).

<sup>38</sup> Omar, Imtiaz. *Emergency Powers and the Courts in India and Pakistan*. vol. 53. (Martinus Nijhoff Publishers, 2002).

sure that the executive is performing its functions within the prescribed limits. Keeping in view this perspective of arguments, a constitutional duty is conferred on the Court to provide sufficient precautions against the misuse of state authority adversely affecting individuals' rights. During constitutional emergencies of India and Pakistan, the concept of judiciary as a controlling tool has been thoroughly examined. In both countries, the Courts have a divergent approach regarding judicial review. This literature helped examine the historical developments taking place in both India and Pakistan in the field of constitutional emergencies, conceptualizing judicial activism. Nonetheless, legal development in constitutional and democratic system justifies further research in the said area.

In another Article, *Saeed Shafqat*<sup>39</sup> gave analytical review of military regimes and civil rule effecting institutional architecture of the state. However, judicial assistance in the transition of military regime is not taken into account. So, the researcher critically investigates the role of judiciary, in order to justify acts of military in both military as well civilian rules. This work also examined how the military extended its authority to civilian governments and indirectly govern the country in the times of civilian rule.

*William N. Eskridge Jr.*<sup>40</sup> further investigated the complexities attached with the formalist-functionalist dichotomy as earlier articulated by *Peter Strauss*. The author broadly presented mechanism for contrasting formalist and functionalist theories regarding distribution of authority among three branches of the government and highlighted judiciary's role in this transition of powers. The author investigated hypothetical approaches to the dispersion of authority. The author advocates that

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<sup>39</sup>Shafqat, Saeed. "Democracy in Pakistan: Value change and challenges of institution building." *The Pakistan Development Review* (1998): 281-298.

<sup>40</sup>Eskridge Jr, William N. "Relationships Between Formalism and Functionalism in Separation of Powers Cases." *Harv. JL & Pub. Pol'y* 22 (1998): 21.

governmental legitimacy is not mono-vocal; rather it is multi-vocal, based on rule following formalism, rule of law, political efficacy functionalism, and flexibility. This article has been examined with the perspective of Pakistan's constitutional and structural mechanism about trichotomy of powers.

*Suzanne Prieur Clair*<sup>41</sup> examined that the US Supreme Court has used two competing approaches to analyze the issue of separation of powers: functional and formalist approaches. The author presents arguments regarding both approaches and highlighted the issues associated with both these approaches. It is a very interesting article for differentiating both the concepts and associated problems thereof. The researcher examined both the approaches with the help of diagrams, in order to make it easier for the readers to distinguish between the two concepts.

Likewise, *Philip B. Kurland*<sup>42</sup> extensively examined how the doctrine of separation of powers emerged in the USA, how tripartite partition of the state powers and subdivision of these branches have been made. While advancing the concept, the author highlighted that experience to be our only guide. The author also elucidated the downfall of the separation of powers and concluded that the structural growth in judicial branch is the outcome of the breakdown of the principles of separation of powers. This article was considered how the USA transformed its democratic system and how the trichotomy of powers evolved and controls each others. The researcher critically examined the work and compared it with the trichotomy of powers in Pakistan.

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<sup>41</sup> Clair, Suzanne Prieur. "Separation of Powers: A New Look at the Functionalist Approach." *Case W. Res. L. Rev.* 40 (1989).

<sup>42</sup> Kurland, Philip B. "The Rise and Fall of the" Doctrine" of Separation of Powers." *Michigan Law Review* 85, no. 3 (1986): 592-613.

*Alexander M. Bickel*<sup>43</sup> in his book examined the Supreme Court's unavoidable role in the American government. The author highlighted the arguments for the establishment and justification of judicial review and referred to *Marbury's* case. The author considered the US Supreme Court to be the least dangerous branch with the extraordinary authority of judicial review against the other governmental branches. Though, the constitution does not confer power of judicial review explicitly so the assertions that judiciary has no constitutional validity have been counter-argued by the author. The researcher examined this article to the extent of justification for the establishment of judicial review and development of the concept of judicial activism in the USA with the help of leading cases.

*Peter L. Strauss*<sup>44</sup> contributed literature in response to two judgments of the Supreme Court of the USA that how to give contemporary shape to separation of powers, especially accommodating the complex structure of the federal government. The author also investigated some literary work of other scholars such as *Bowsher* and *Schor* and addressed these scholars' approaches towards the issues. The author addresses various governmental issues in the light of the Constitution. This article helped understand structural and governmental authority and can be served as a model how state organs distribute authority. This article was examined in the light of debates for differentiating formalist and functionalist approaches regarding distribution of state powers.

*George W. Carey*<sup>45</sup> critically examined and responded the arguments of thwarting majority rule and advocated that how separation of powers can help prevent

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<sup>43</sup> Bickel, Alexander M. *The least dangerous branch: the Supreme Court at the bar of politics.* (Yale University Press, 1986).

<sup>44</sup> Strauss, Peter L. "Formal and Functional Approaches to Separation of Powers Questions A Foolish Inconsistency." *Cornell L. Rev.* 72 (1986).

<sup>45</sup> Carey, George W. "Separation of Powers and the Madisonian Model: A Reply to the Critics." *American Political Science Review* 72, no. 1 (1978): 151-164.

governmental tyranny. The author highlighted the consequences of accumulation of powers in one hand. The author associated tyrannical governmental with distorted form of absolute monarchy and linked it with arbitrary and capricious governments. The author suggested separation of powers can help eradicate the threat of tyrannical governments. The author suggested that by these considerations we can secure government of law and not of men. This article was analyzed that how trichotomy of powers can be used as a safeguard against tyrannical governments in Pakistan.

*Dr. S.M. Haider*<sup>46</sup>, contributed literature about the development of judicial review up to 1967, especially, during military regime. While developing the proposed concept, the researcher referred to historical events and developments that led to institutional disorder.

*George Rossman*<sup>47</sup>, in his paper, contributed to the historical genesis of separation of powers. In this article, the author talked about Ancient Age, Dark Age, and Modern Age. The author gave an overview of how Montesquieu's literary work, "the Spirit of Laws", shaped thinking of the framers of the US Constitution. The author further highlighted that how the framers, for the first time in the democratic world, introduced Montesquieu's concept of separation of powers and checks and balances. Keeping in view its relevancy with the research undertaken, this article was examined for realization of the concept and historical genesis of separation of powers.

*Louis B. Boudin*<sup>48</sup> is a critic to the judicial activism. His work highlighted how the judiciary manipulates other branches and dictates its authority. In his book, the author referred to *Marbury v. Madison* which is considered to be the foundation

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<sup>46</sup> Haider, Syed Mohammad. "Judicial review of administrative discretion in Pakistan." (1967):1898-1898.

<sup>47</sup> Rossman, George. "The Spirit of Laws: The Doctrine of Separation of Powers." *American Bar Association Journal* (1949): 93-96.

<sup>48</sup> Boudin, Louis Boudianoff. *Government by judiciary*. Vol. 2. (W. Godwin, Incorporated, New York, 1932).

for the constitutionality of the authority of judicial review. The author investigated judicial power understood by *James Wilson* and *Marshall* approaches towards separation of powers among co-equal departments. The author examined the modern version of judicial power expounded by *Baldwin* and *Haines*, which is based on the notion of accumulation of governmental authority in judiciary leading to supreme judicial power in the nation. This book is very relevant in Pakistan's context. It provides a theoretical framework how judiciary validated the unconstitutional actions of military at the expense of democracy and representative institutions. This work highlighted how judiciary can be circumscribed to its constitutional limits without deviating from the prime principles of separation of powers and their mutual control.

### **1.5. RESEARCH METHODOLOGY**

While conducting this doctrinal legal research, qualitative and deductive research methodology has been used. With broader perspective of constitutionalism, the researcher has examined eighty-five cases, including leading constitutional cases, and critically analyzed how the judicial organ in Pakistan has been evolving, in order to identify its jurisdictional bounds. The cases provide a framework that how systematically judiciary invalidated extraconstitutional discourse and ensured its autonomy. After its restoration in March 2009, judiciary not only invalidated extraconstitutional military actions, but simultaneously sought its autonomy from Parliament. This, in turn, opened another avenue of confrontation between these two state organs, which the researcher examined in the light of self-realization of constraints where state organs will take a reasonable time for identification of their jurisdictional spheres. Keeping in view intensity and scope of the topic, both primary and secondary sources have been consulted to develop contents of the research. These sources include constitutional law, research articles, substantive and procedural laws,

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statutory laws of both the USA and Pakistan, libraries including digital libraries and online databases. The author not only explored and consulted material from the libraries in Pakistan, but also visited the USA and conducted research in the Kansas School of Law, the University of Kansas. The author exploited various libraries and databases across the US. Particularly, the libraries situated at the University of Kansas such as Wheat Law Library, Watson Library, and Anchutz Library. The researcher made full use of the available resources and consulted literature regarding constitutionalism and role of judiciary, separation of powers and associated concepts thereof.

In Pakistan, the researcher consulted various libraries such as the Main Library and the Law Department Library of the International Islamic University, Islamabad. The researcher also consulted manuscript and online databases of the Quaid-i-Azam Library, Mall Road Lahore, the University Law College Library and the Main Library of the University of the Punjab, Lahore. A comparative analysis between the US and Pakistan's constitutional models has been made, in order to demarcate constitutional authority of state organs. The dilemma of judicial autonomy in Pakistan with meaningful suggestions for conceptualization of separation of powers and reasonable control against exploitation of authority, in the context of constitutionalism has been made. With the US perspective, the researcher consulted and focused on material available in the USA. In Pakistan, however, the researcher consulted and the literature pertaining to the legal and the constitutional development in Pakistan. The researcher, while theorizing the US model of constitutionalism, comparatively analyzed the concept of constitutionalism, how the government's authority has been distributed among various organs, to what extent the state organs are performing their constitutional functioning, what are the various key factors adversely impacting

judiciary's performance. The difference between both the US and Pakistan's model has been examined with the help of the available literature and resources.

### **1.6. THEORETICAL FRAMEWORK**

The researcher while applying theoretical framework of self-realization of judicial restraint, coined by *James Bradley Thayer*<sup>49</sup>, highlighted the inevitability of self-realization of constraints, in order to make a successful transition of constitutionalism in Pakistan. In modern judicial arena, it refers to passive virtues, expounded by *Alexander M. Bickel*<sup>50</sup> who furthered the concept in his literary work.<sup>51</sup> Keeping in view the ongoing tension among the state organs, the researcher urged for the active use of the judges' passive virtues.

In Pakistan's democratic transition, the military being an additional unavoidable stakeholder plays a very significant role that cannot be overlooked. Hence, ensuring judicial independence with reasonable controls and self realization of constraints among the state organs is a key towards upholding and strengthening of constitutionalism in Pakistan. This research provides a descriptive account of how judiciary has been struggling and to what extent it has been successful, in order to ensure its independence from the other state organs, including the entrenched military and its transformative preservation in the civilian rule. This work examines that how the judiciary in Pakistan gradually secured its autonomy and invalidated extraconstitutional discourse. In order to identify its jurisdictional sphere, another journey of confrontation between judiciary and Parliament has been started, which the researcher sought to examine in the light of a theoretical framework of self-realization

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<sup>49</sup> Thayer, James Bradley. *The origin and scope of the American doctrine of constitutional law*. Little, Brown, (Oct. 25, 1893), pp. 129-156.

<sup>50</sup> Bickel, Alexander M. "Foreword: the passive virtues." *Harv. L. Rev.* 75 (1961): 40.

<sup>51</sup> Bickel, Alexander M. *The Least Dangerous Branch: the Supreme Court at the Bar of Politics*. Yale University Press, 1986. (Chapter No. 4).

of restraints. With the glimpse of self-realization of constraints, the state organ may settle their jurisdictional spheres and may also identify the limits within which state organs may be allowed to control one another. The sooner state organs identify their limits, the more productive constitutionalism would be.

### **1.7. LIMITATIONS AND DE-LIMITATIONS OF THE STUDY**

Keeping in view the time and resources constraints, this research has been limited to the comparative analysis of the USA and Pakistan. In every constitutional democracy, the governmental authority, in order to run the state affairs, has been divided among three organs each sovereign in its affairs and forbear to encroach upon the others' sphere. The concept of separation of powers was first originated in ancient Greece and was became part of the initial Constitution of the Roman Republic. Aristotle (384 – 322 BC) in his book, "The Politics", stated three elements in each constitution: deliberative, official, and judicial element. Similarly, the US Constitution incorporated the concept of separation of powers, which is globally followed in the democratic world. Like other democracies, the Constitution of Pakistan also envisaged the trichotomy of powers. In division of state authority, judiciary played an inevitable role. Nevertheless, judiciary has been facing challenges from the other state organs and its validation of military interventions made its role more critical.

## **Chapter No. 2**

### **CONCEPT, PHILOSOPHY AND HISTORICAL EVOLUTION OF THE NOTION OF CONSTITUTIONALISM AND JUDICIAL ACTIVISM**

Both constitutionalism and judicial activism are philosophical concepts that need critical appreciation. This chapter examines the nature and scope of constitutionalism, its various kinds and significance in a democratic system, its various constraints, and status of the constitution. This chapter conceptualizes the philosophy of sovereignty and analyzes the debate on limited and unlimited sovereignty. Another important aspect of this chapter is judicial activism, its origin and introduction in legal fraternity, and development of the concept in the USA. This segment also highlights how this concept was introduced in Pakistan, its constitutional validity, and its impacts on the Islamization of laws in Pakistan. This chapter also highlights the test and extent for judicial activism and the essential factors for making a regime successful with reference to the role of judiciary. Lastly, this chapter elucidates various considerations that led to the confrontation between judiciary and regime and examined how a pro-regime judiciary challenged the validity of Musharraf's regime.

#### **2.1. THE CONCEPTUALIZATION OF CONSTITUTIONALISM**

The Constitutionalism is a system of governance whereby authority of the government is restricted by a fundamental law. Unlike the concept of police state, where the government establishes its despotic hegemony, the state affairs in a democratic state are divided into three heads: the Legislature, the Executive, and the Judiciary. All these organs exercise a reasonable check on one another. Constitutionalism is not only a normative theory, which elaborates the forms and

procedure for the governance, constitutionalism deals with controlling, restraining, and transferring of the state powers.<sup>52</sup>

Constitution representing the will of people and comprised of rules establishing, organizing, and elucidating jurisdiction of the government. Moreover, the constitution adapts itself to the needs of society as enunciated by the Canadian Court in the case *Henrietta Muir Edwards et al. v. Attorney-General for Canada*<sup>53</sup>, where the Court observed that constitution is like a living tree which grows and expands within its natural limits. Primarily, constitutions deal with allocation, regulation, and restriction of powers being exercised by state authorities.<sup>54</sup>

The idea of constitutionalism can be linked with the concepts given by John Locke and the founders of the American republic. According to them, the governmental authority is not an absolute authority so it can and should be legally restricted. Further, this authority has not been assumed from itself rather there are set of rules whereby certain powers are conferred on the government in order to regulate the state affairs.<sup>55</sup>

Constitutionalism is distinct from monarchies, dictatorship or the concept of totalitarian state, where the power is concentrated in one authority having absolute command and there always lurks the likelihood of its being misused. As Lord Acton's famous dictum was quoted by Montesquieu, 'power corrupts and absolute power corrupts absolutely'.<sup>56</sup> Similarly, abuses cannot be ruled out where the authority is conferred by the will and ideology of an individual or set of individuals that does not essentially signify the collective will of society. Logically, in a representative form of

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<sup>52</sup>Waldron, Jeremy, "Constitutionalism: A skeptical view." (2012): 12-13.

<sup>53</sup> *Edwards v. Attorney-General for Canada*, 1930 A.C. 124 (1930).

<sup>54</sup> De Smith, Stanley A. *Constitutional and administrative law*. (Penguin books, 1977): 6.

<sup>55</sup>Waluchow, Wil. "Constitutionalism." (2001).

<sup>56</sup> Cortés Rodas, Francisco. "The Challenge of Democracy to Despotism: Benjamin Constant and Alexis de Tocqueville." *Estudios Políticos* 40 (2012): 99.

government, majority of the legislative bodies is elected by the majority of people. Conversely, in exceptional circumstances where minority controls over legislation, it would ostensibly deny majority rights and to a great extent would secure minority rights. Generally, the government is required to make laws for all the citizens without discrimination, legislatures should be comprised of the persons collectively accountable to the popular will.<sup>57</sup>

Thus, constitutionalism advocates mechanism of governance with a limited authority. Similarly, the state authorities, whether elected or not, cannot discharge its functions beyond the constitution, which is the ultimate and the supreme law of the land. All the subjects of a state including government are required to comply with the constitution. In the modern democratic world, most of the states have written constitutions where the triumph of constitutionalism is significantly achieved. Mostly, these states affirm the constitution establishing and protecting individuals' rights and regulating authority of the state organs. In plethora of cases, where the courts while upholding the constitution invalidated acts of the government if found contrary to the provision of the constitution.<sup>58</sup>

In Pakistan, the concept of constitutionalism is maturing gradually where the state organs are striving to identify their jurisdictional spheres. *Sayyed Yousaf Raza Gailani v. the Registrar of the Supreme Court*<sup>59</sup>, is considered to be a landmark case of constitutionalism wherein the court emphasized that constitution should be interpreted in accordance with constitutionalism, in order to ensure equilibrium among the state organs: the legislature, the executive and the Judiciary. Hence, all the state organs and holders of high public offices derive their legitimacy from the

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<sup>57</sup> Mayer, Martin. *Emory Buckner*. Harper & Row, (1968): 224.

<sup>58</sup> Alexander, Larry, ed. *Constitutionalism: philosophical foundations*. (Cambridge University Press, 2001): 16.

<sup>59</sup> *Sayyed Yousaf Raza Gailani v. the Registrar of the Supreme Court*, PLD 466 (SC 2012).

Constitution. So, the ultimate sovereignty is vested in the Constitution to which the people of Pakistan have surrendered their will.

Until the 1980s, because of the colonial history and a continuing interest among Asian elites in western legal institutions and process, Asian legal scholars were commonly familiar with western legalism and constitutionalism, while their legal counterparts in the west were generally ignorant of the law and constitutionalism in Asia.<sup>60</sup> However, with the changing trends, the concept of globalization, and the importance of Asia in the sociopolitical economy of the world, which has tremendously changed, necessitated the western legal counterparts to be fully conversant with the Asian legalism and constitutionalism. In order to further conceptualize constitutionalism, it may be referred to as a theory that advocates compliance to constitutional principles. For theoretical understanding, constitutionalism maybe divided into the following categories:

### **2.1.1. Particular and General Constitutionalism**

Particular constitutionalism refers to the vitality of the principles of a particular constitution. Such constitutionalism may be referred to both parliamentary sovereignty as prevalent in the UK and judicially enforced limitations on legislative authority as prevalent in the USA, having affection for Englishman's and American's respectively. On contrast, general constitutionalism advocates constitutional government which is structured, regulated, and restricted by a constitution. Keeping in view this pretext, constitutionalism is mainly concerned that government should be structured and constrained by a set of rules. Even though there are differences in both American and English constitutionalism, yet in both countries constitutionalists

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<sup>60</sup> Beer, Lawrence Ward, ed. *Constitutionalism in Asia: Asian views of the American influence*. (University of California Press, 1979): 9.

advocate mechanism of political configuration that circumscribes the government's power by various means. Despite of the similarities in both forms of the governments such as federalism, while some of these are distinct such as the US constitution provides extensive provisions for judicial review of the legislative actions. Nonetheless, the idea of having a formally articulated structure in order to limit government's sphere of authority is common by two sets of constitutionalists.<sup>61</sup> In Pakistan, somehow, a blend of the US and the UK constitutional structure with Islamic concept of sovereignty is prevalent: the Islamic republic, where the sovereignty belongs to Allah, the Almighty, a federation of four provinces having provincial autonomy, a parliamentary form of government, trichotomy of powers, and constitutional provisions have been provided for the judicial review of the legislative actions.

### **2.1.2. Explicit and Implicit Constitutionalism**

For the academic discussion, it can be said that every stable government has a constitution that comprised of set of fundamental rules articulating different means whereby governmental powers are to be exercised. These rules also delegate authority to the person or group of persons by whom these powers are to be exercised and jurisdictional circle for the exercise of these powers such as how laws are to be enacted, modified, and so on. Keeping in view the above arguments, the developing countries have constitutions as much as the developed countries have; nevertheless the rules regulating the constitutions exist in some different forms. On this touchstone, even dictatorship has a constitution which may be different from that of parliamentary sovereignty and may be different from that of republican system promoting the idea

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<sup>61</sup> Waldron, Jeremy. "Constitutionalism: A skeptical view." (2012): 4-5.

of separation of powers. Paul J. Magnarella<sup>62</sup> while responding to this argument elucidated that like democratic states dictatorship has a constitution comprised of legal norms and procedure, in order to run affairs of the state. In its absence, it may be referred as a state having constitution without constitutionalism. In like circumstances, the comparativists term it as a 'nominal' rather than 'normative' constitution.<sup>63</sup>

## 2.2. CONSTITUTIONALISM AND CONSTRAINTS

Unlike a normative theory that establishes forms and procedures for the governance, constitutionalism provides a mechanism in order to regulate, restrict and control governmental powers.<sup>64</sup> Restricting government in its function is one of the principles linked with constitutionalism.<sup>65</sup> However, C.H. McIlwain argued that putting restriction on the government is the essential quality of constitutionalism.<sup>66</sup> Contrary to the concept of concentration of powers that leads to despotic use of authority, constitutionalism advocates power dispersing, streamlining, and controlling government's authority. There are many terms that may be used for establishing connection between constitution and the way it imposes restrictions on the government. Considering various terms being used for establishing link between constitutions and different kinds of constraints, limited government is most commonly used phrase. In order to investigate constitutionalism in the context of control, there is also connection between constitutionalism and restraints. To comprehend various

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<sup>62</sup> Magnarella, Paul J. "The Comparative Constitutional Law Enterprise." *Willamette L. Rev.* 30 (1994): 501.

<sup>63</sup> Waldron, Jeremy. "Constitutionalism: A skeptical view." (2012): 6.

<sup>64</sup> Fuller, Lon L. *The morality of law*. Vol. 152. Yale University Press, 1969: 96.

<sup>65</sup> Cass R. Sunstein. Constitutionalism after the New Deal, *Harvard Law Review*, 101 (1987): 434-36.

<sup>66</sup> McIlwain, C. "Constitutionalism: Ancient and Modern (Ithaca)." *NY: Cornell University* (1940): 24.

phrases such as controlled, restraint, and limited government that needs critical investigation.<sup>67</sup>

Controlled government or controlling state not being essentially a negative or constraining idea. Such control must be imposed by the people to make sure that the government is working according to their inspirations. If people want poverty alleviation, for instance, the constitution shall provide a mechanism for controlling the institutions so as to meet public inspiration. In contrast, restrain is a negative idea whereby the government is prevented from doing certain things. This idea continues on the ground of identification of certain abuses that are desired to be avoided and hence specifically prohibited. Articulating this prohibition into the very document constituting government authority and often take the form of rights. In this pretext, whatever government positively does but it shall not do these things. In this way, modern constitutionalism got popularity due to its connection with human rights. Apart from these specific constraints, the constitution also imposes broader limitations on the projects that government can take on. The constitutionalists talk not only about the limited government avoiding particular abuses but a broader sense that many of the inspirations that democratic government have *per se* illegitimate.<sup>68</sup>

The idea of limited government, restraint government, and controlled government can be conceptualized on the pretext that the constitutionalists often believe that there is simply proper and improper use of state authority whereby the constitution is entrusted to confine the state authority to proper uses only. Proper and improper are bivalent as opposed to normative logic which is trivalent: actions are prohibited, permitted, or required. Neglecting the third category, i.e., what is required as opposed to what is permitted can distort our analysis. To say precisely, there are

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<sup>67</sup> Waldron, Jeremy. "Constitutionalism: A skeptical view." (2012): 12-14.

<sup>68</sup> *Ibid.* pp. 14-16.

proper, improper, and required uses of state authority. So, the constitution has to make sure that state does what it is required to do as to ensure it is restrained from doing what is prohibited.<sup>69</sup>

Keeping in view the democratic norms of behavior, all the democratic constitutions aim to regulate the exercise of political power wherein all the political institutions reflect these norms. However, third world democracies like Pakistan, where the institutions are passing through a transition, have substantial variations in terms of respect for constitutional rules on the part of political actors. These variations ultimately leave impacts on the prospects of institutionalization of democracy in a country. A democratic system can be more institutionalized wherein the political actors structure and adhere to the democratic rules articulated in the constitution.<sup>70</sup>

The significance of rules adherence to the democratic institutionalization has long been recognized. Compliance with such democratic rules and norms contained in the constitution are broadly defined by constitutionalism and that is a generally recognized prerequisite for democratic consolidation. In the study of democratization, constitutionalism is considered to be a fundamental criterion of consolidation, where the very existence of a state, subject to law, is an inevitable reinforcing condition for constitutionalism. It is worth-mentioning that without an effective government and state apparatus, which act within the constraints of law, would hinder democratic development as citizens would not be fully independent to exercise their political rights. Some scholars have reached this point by using various

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<sup>69</sup> Ibid. pp. 19,20.

<sup>70</sup> Alberts, Susan. "How constitutions constrain." *Comparative Politics* 41, no. 2 (2009): 127.

formulations such as the elimination of perverse institutions, greater accountability and rule of law.<sup>71</sup>

Even though constitutionalism is recognized to be a basic and fundamental criterion for democratic institutionalization, the development of constitutionalism has received very little attention. Conversely, socioeconomic and cultural conditions have been greatly attributed to the success or failure of institutionalization of democracy. Nonetheless, with the modern rediscovery of political institutions, numerous studies have addressed this problem and closely associated democratization with constitutionalism. Additionally, these studies have not been focused on the development of constitutionalism and relationship between institutional differences and the emergence of constitutionalism. Exceptionally, *Barry Weingast* work analyzed rule-constrained behavior and the establishment of constitutionalism. *Weingast* pointed out that political elites are expected to uphold rules constraining their sphere of authority when citizens unite to raise the costs of transgressions and when institutional infrastructure aims to protect the fundamental interest of key groups.<sup>72</sup>

In such situations, rule subversion is expected to be very costly consequently inducing political elites to exercise their authority within the rules. This approach to explicating the establishment of constitutionalism opens up various avenues for more research in the context of relationship between institutional choice and democratic development. Amongst others, relationship between constitutions and

<sup>71</sup> Diamond, Larry. *Developing democracy: Toward consolidation*. (JHU Press, 1999): 74; Valenzuela, Julio Samuel. *Democratic consolidation in post-transitional settings: notion, process, and facilitating conditions*. Vol. 150. Helen Kellogg Institute for International Studies. (University of Notre Dame, 1990): 64-66.

<sup>72</sup> Weingast, Barry R. "The political foundations of democracy and the rule of the law." *American political science review* 91, no. 2 (1997): 245-63; Mittal, Sonia, and Barry R. Weingast. "Self-enforcing constitutions: with an application to democratic stability in America's first century." *The Journal of Law, Economics, & Organization* 29, no. 2 (2011): 278-302.

constitutionalism is of great interest. Constitutions produce motivations influencing rule adherence to the extent they balance the dispersal of powers and facilitate performance of the democratic system. Balanced distribution of powers and where democratic system performs reasonably well ensures constitutionalism and resultantly establishes a state governed by rule of law.<sup>73</sup>

In order to investigate why constitutions constrain, it is essential to examine constitutions themselves. Institutional architecture of a democracy and its collective goals are envisaged by the constitutions. These constitutional provisions further establish behavioral incentives that are significant to understand on their own. Investigating constitutions from this perspective ensures compliance with the democratic rules that helps understand how and why constitutional differences can affect the establishment of constitutionalism and progress towards democratic institutionalization.

Constitutional incentives affecting adherence to the rules can be examined along two dimensions: distribution of powers and constitutional performance. Each aspect creates incentives associated to constitutionalism and democratic institutionalization by raising or lowering the cost of rule adherence versus rule subversion. A logical interpretation to the distribution of powers can be explicated that a constitution that ensures balanced distribution of powers extend protection to all its institutions that generates direct incentives for upholding the rules, since these rules can benefit them on several levels. Hence, constitutions mandating equal division of powers should establish stronger incentives to comply with their rules than those permitting the concentration of power. Likewise, constitutional performance is measured that how well a constitution establishes a democratic

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<sup>73</sup> Alberts, Susan. "How constitutions constrain." *Comparative Politics* 41, no. 2 (2009): 128.

system, characterized protection of rights, effective governance, and popular satisfaction with democracy. In like circumstances, democratic rules are seen to work and subversion is likely to be costly, constitutionalism is more easily established. So, the constitutions ensuring equal distribution of powers and where democratic system performs well, a country should be characterized by constitutionalism and democratic institutionalization. Similarly, there should be evidence of four outcomes associated with constitutionalism: institutionalized protections, responsive governance, predictability of the government, and peaceful resolution of conflicts.<sup>74</sup>

### **2.3. THE NATURE AND PHILOSOPHY OF SOVEREIGNTY**

In order to conceptualize the idea of constitutionalism, powers' dispersion, and control on the exercise of powers, it is inevitable to investigate the nature and extent of sovereignty. To understand the nature and philosophy of sovereignty, there is a need to make comparison between Thomas Hobbes and John Locke who advocated the theories of constitutionally unlimited sovereignty and sovereignty limited by social contract having substantial limitations respectively.<sup>75</sup> John Locke, supporter of the limited sovereignty, believes that unlimited sovereignty is enjoyed by the people who surrender their will through a social agreement whereby they would be governed by men of caliber and wisdom that gave birth to the notion of limited sovereignty as the ultimate sovereignty rests with the people to override their respective government if it intrudes limits of its social agreement. Like Hobbes, Austin is of the view that all laws are the command of a sovereign, a supreme authority who is neither bound nor restricted by any means. Whereas, limited sovereignty is incoherent.

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<sup>74</sup> Ibid. p. 131.

<sup>75</sup> Mahajan. Vidya Dhar. "Jurisprudence and Legal theory." (1987): 116.

In modern democratic culture, theory of unlimited sovereignty can be referred to the British parliament, which is considered supreme and constitutionally unrestricted in its functions. Nevertheless, most of the constitutional democracies face hardships while applying the idea of unlimited sovereignty such as the USA, India and Pakistan, where governmental authority is limited by their respective constitutions. Austin justified this argument that sovereignty may rest with the people or body having unlimited authority. Furthermore, constitution can circumscribe the government bodies. Nevertheless, the people being sovereign enjoy unlimited power. These people are governed by their elected representatives as depicted by H.L.A. Hart, "the commanders are commanding the commanders".<sup>76</sup>

#### **2.4. SOVEREIGNTY - ISLAMIC AND OTHER PERCEPTIONS**

As constitutionalism defines the notion of a limited government and explains how it assumes and exercises that authority. So, let's consider the controversy of sovereignty, with whom it lies and how it is being exercised in a welfare state. As far as the history of sovereignty and delegation of authority is concerned, there are various perceptions such as the Islamic and the Western school of thought. According to the Islamic notion of sovereignty, Allah, the Almighty, enjoys the ultimate sovereignty over the entire universe. In the form of manifestation, this sovereignty had been entrusted to the Prophets (PBUH). This manifested sovereignty is further delegated to the caliphate to rule the commonwealth. Coherently, with the territorial division of the states, the modern Islamic concept of sovereignty, which is conferred to the people as a sacred trust from the divine authority, whereby the people

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<sup>76</sup>Waluchow, Willfrid J. "A common law theory of judicial review." *Am. J. Juris.* 52 (2007): 24.

surrendered their will to their elected representatives in the form of a social contract commonly known as constitution.

Among the Islamic scholars, there is a general consensus regarding sovereignty that Islam places sovereignty in Allah, the Almighty, which the Holy Quran unequivocally explicates Allah as *Al-Malik*, which means sovereign and *Malik-ul-Mulk*, which means the eternal possessor of sovereignty. Interestingly, these two attributes are also among the 99 beautiful names of Allah, the Almighty. Further, Quran<sup>77</sup> clarifies that all powers lies in God, who is *Al-Muqtadir*, which means possessor of all powers. The Quran<sup>78</sup> delegates sovereignty in the form of human agency. By virtue of their faith and submission to the will of God, Muslim community is considered as *Ummah* (people) under one sovereign – a complete submission to God. Thomas Hobbes visualized similarly that the complete surrender of powers by the individuals to the state. In former case, the submission is more powerful for it surrenders and subordinates human will to the will and law of God.<sup>79</sup>

The Islamic notion of sovereignty further advocates that Allah is the law giver and the true source of all laws, as depicted by the Holy Quran that declares 'The *Hukm* belongs to Allah alone'.<sup>80</sup> This basic rule, that Allah's laws alone are acceptable to the Muslims, determines the character of Islamic law and gives directions to all interpretations and *Ijtihad*. And no temporal authority can command a Muslim's obedience, unless the authority is based on the commands of Allah. This is the essence of a 'social contract'<sup>81</sup> within a Muslim community. Moreover, each

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<sup>77</sup> The Quran (51:58).

<sup>78</sup> The Quran (2:30).

<sup>79</sup> Saddiqi, Riaz A., *Concept of Sovereignty in Islam and Human Accountability*, Khaleej Times, June, 25, 2004.

<sup>80</sup> The Quran (6:57).

<sup>81</sup> In Islamic context, by social contract we mean the basis upon which Muslims, acting upon the Commands of Allah, have agreed to cooperate with each other and to live together in the form an organized society.

Muslim is a Muslim not only because he believes in the existence of oneness of God and the truth of the mission of His Messenger, but also abides by the laws prescribed by the wise and just Lord. These laws grant security from oppression and ensure justice and fair play in all dealings. A Muslim surrenders his will to Islam so that his life may be regulated in accordance with the *Hukm* of Allah who is the true and ultimate sovereign.<sup>82</sup>

Pakistan, being an Islamic Republic, articulates in its Preamble to the Constitution that the sovereignty over the entire universe belongs to Allah, the Almighty. The Preamble further elucidates that the authority shall be exercised by the people through their elected representatives as a sacred trust where the principles of democracy, freedom, social justice, and people's lives shall be aligned according to the teachings of Islam.<sup>83</sup>

According to the other notions of sovereignty, the concept of sovereignty is as old as the era of ancient cavemen. Speaking logically, the desire for establishing a society could be connected with the pursuit for leadership. In ancient times, the headship must have been considered as a foundation of assistance in various walks of life. Moreover, the leadership must have been possessed in some seasoned persons who were men of caliber and wisdom. Pursuit for such leadership could be considered as the initial traces of human struggle towards having sovereignty. Despite the fact that traces of human search for leadership, which led to the concept of sovereignty, are not known to human history in terms of exactitude of time, the concept of popular sovereignty is considered to be the outcome of this approach. It is believed that the era of police state, where the state power was concentrated in a single person or body of persons, is claimed to have been emerged from that search. Although both these

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<sup>82</sup> Nyazee, Imran Ahsan Khan. *Outlines of Islamic jurisprudence*. (1998): 91.

<sup>83</sup> Preamble to the Constitution of Pakistan, 1973.

concepts are distinctive, but they overlap at a point where the power is surrendered to the representatives for ruling the commonwealth.

#### **2.4.1. Sovereignty vis-à-vis Government – an Overview of Thomas Hobbes and**

##### **John Locke**

Contextually, sovereignty and government are two distinctive but overlapping terminologies. The former is the supreme and unlimited authority on a particular area as predicted by *Salmond*, "Sovereignty or supreme power is that which is absolute and uncontrolled within its own sphere."<sup>24</sup> Whereas, the latter is associated with mechanism in order to exercise the sovereign authority. This sovereign authority maybe exercised by persons or bodies. After clarification of this difference, it can be comprehended that government is not sovereign body rather sovereignty rests with someone else. After recognition of this inference, one can logically talk of limited government coupled with unlimited sovereignty.

For the sake of arguments, this concept should be applied to constitutional democracies where people are considered to be sovereign possessing unlimited authority. Nonetheless, the government that exercises sovereign authority on behalf of people is constitutionally limited. As elaborated by John Locke, people possess unlimited sovereignty and also have normative control to challenge their government or any part thereof if it exceeds its constitutionally defined limits. Theoretically, there is a distinction between popular sovereignty and democracy. The former requires that people should have constitution as well as government of their choice. However, it does not remove the difference that exists among various forms of governments on the menu from which the people are supposed to choose. Both John Locke and

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<sup>24</sup> Mahajan, Vidya Dhar, "Jurisprudence and Legal theory," (1987): 111.

Thomas Hobbes believed in popular sovereignty. According to them, people are sovereign and they may entrust legislative authority in an individual or group of individuals, constituting monarchy or aristocracy.

Contrary to this approach, people may choose an alternative system of assembly comprising a large representative institution that constitutes a direct or indirect democracy. Hobbes believed that people would be making a mistake if they vested sovereignty in a democratic assembly. Locke, on the other hand, credited people with thinking that people can be safe only if the legislature is placed in collective body of men instead of delegation of this legislative authority to an individual. This delegation of powers to the collective body of persons may be termed as parliament, senate, or whatever you please. He believes that it is imperative that the collective body should have 'Supreme Power' of the commonwealth. However, neither of them thought a constitution to become more democratic simply by being the upshot of popular choice.<sup>85</sup>

Even though, both government and sovereignty are two distinct ideas yet both are interlinked and can be applied to the same individual or body. According to Hobbes, in delegation of the sovereign authority, there is an absolute transfer of powers from sovereign individuals to a political sovereign. This political sovereign ultimately enjoys an absolute authority. In order to rule the commonwealth, the supreme governmental body shall possess supreme sovereignty and shall enjoy unlimited powers and authority. Conversely, limited sovereignty would destroy the very possibility of stable government. For the first time, Jean Bodin gave the conception of absolute, undivided and perpetual sovereignty.<sup>86</sup>

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<sup>85</sup> Alexander, Lacey, ed. *Constitutionalism: philosophical foundations*. (Cambridge University Press, 2001): 272-273.

<sup>86</sup> Ibid, p.116.

It is admitted fact that both government and sovereignty are conceptually different but it doesn't mean that both could not be applied to an individual or group.<sup>87</sup> So far as the so called unrestricted sovereignty of British Parliament is concerned, there is dual aspect of restrictions on the legislative sovereignty of the English parliament. The supremacy and unlimited authority of parliament is subject to two limitations: external and internal limitation. The former limitation refers to the apprehension of disobedience or resistance of the law by majority of people while the later deals with or arises from the exercise of sovereign power itself.

## **2.5. THE CONCEPT AND PHILOSOPHY OF JUDICIAL ACTIVISM**

Judicial activism is considered to be the enhancements of jurisdictional circle of judiciary, in order to take over an area of the legislative vacuum. Judiciary is expected to dispense with justice in a fair and just manner without any discrimination as government's efficiency is subject to impartial, independent and positive administration of justice. Both executive and legislature are expected to perform their functioning according to the inspiration of the people. Nonetheless, where these organs fail to come up with the expectations of the people, judiciary is compelled to takeover to the executive domain so that to ensure justice to the citizens. In a democratic system, good government is inevitable for any state wherein three organs of the government constitute three pillars for good and effective governance and lack of harmony amongst them can lead to administrative chaos. In like circumstance, impartial, independent, and fearless judiciary forms the core of democracy. To secure the right of dispensation of justice to every citizen, the judiciary works as an active catalyst.

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<sup>87</sup>Waluchow, Wil. "Constitutionalism." (2001).

### 2.5.1. Judicial Activism: the Concept

The concept of judicial activism has been around for longer than the term itself.<sup>88</sup> The term "judicial activism" was first used in 1947. In the 1950s, the term "judicial activism" appeared twice in the judicial opinions. In the 1960s, it had been reported fourteen times. In the 1990s, judicial activism and judicial activist have been reported dramatically. In judicial opinions, it has been reported 262 times whereas, in law journals and law review articles, it has been reported 3815 times.<sup>89</sup> Unlike the previous decades, the modern day judges are more likely to accuse their colleagues of judicial activism. Astonishingly, this term has become more ambiguous despite of its increasing use, due to its definition in different and contradictory ways. The scholars as well as judges recognize this problem and continued to speak about the concept without defining it.

From the very beginning, judicial activism lacked any accepted definition rather it encompasses a variety of concepts. The idea of judicial activism is older than the term. Till twentieth century, there were debates in legal fraternity regarding the conceptualization of judicial legislation that referred to making of law by the judges.<sup>90</sup> Blackstone regarded it as important feature of common law, whereas, Bentham considered it as an encroachment to the legislative functions.<sup>91</sup> Judicial legislation got impetus and scholars richly contributed to the merits of judicial legislation in the 1950s.<sup>92</sup> However, it received intense criticism during *Lochner's*<sup>93</sup> era which modern

<sup>88</sup> Gerhardt, Michael J. "The Rhetoric of Judicial Critique: From Judicial Restraint to the Virtual Bill of Rights." *Wm. & Mary Bill Rts. J.* 10 (2001): 585.

<sup>89</sup> Kmiec, Keenan D. "The origin and current meanings of judicial activism." *Cal. L. Rev.* 92 (2004): 1441, 148.

<sup>90</sup> Thayer, Ezra R. "Judicial legislation: its legitimate function in the development of the common law." *Harvard Law Review* (1891): 172.

<sup>91</sup> Cosgrove, Richard A. *Scholars of the law: English jurisprudence from Blackstone to Hart.* (NYU Press, 1996): 56-57.

<sup>92</sup> Cardozo, Benjamin N., and Andrew L. Kaufman. *The nature of the judicial process.* (Quid Pro

day scholars corresponded with judicial activism.<sup>94</sup> Nonetheless, judicial activism was not used in legal discourse by name until the justices consented that the New Deal was on firm constitutional grounds.<sup>95</sup>

In January 1947, Arthur Schlesinger Jr. was the first to introduce the term judicial activism.<sup>96</sup> His article profiled all the nine justices of the US Supreme Court and elaborated alliances and divisions among them: four judges were placed as judicial activists, three were placed as champions of self restraint, and the remaining two were placed as a middle group.<sup>97</sup> Schlesinger referred to a number of meanings that are reasonably similar to the present day definitions of judicial activism, such as judicial activism is the overturning of democratically enacted statutes.<sup>98</sup> Similarly, Mc Whinney is credited with writing two specific articles which advanced a more sophisticated theory of judicial activism.<sup>99</sup> In the same parlance, the first use of "judicial activism" was evident in *Theriot v. Mercer*<sup>100</sup> by C. Hutcheson, Jr. in a judicial opinion overruling a trial court decision.

Legal fraternity describes judicial invalidation of the legislative enactment as judicial activism. Broadly, judicial activism is court's intervention to strike down a duly enacted legislation.<sup>101</sup> It is a practice of disallowing policy, made by the public officials or institutions, which is not explicitly prohibited by the Constitution.<sup>102</sup>

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Books, 2010).

<sup>93</sup> *Lochner v. New York*, 198 U.S. 45, 25 S. Ct. §39, 49 L. Ed. 937 (1905).

<sup>94</sup> Ely Jr, James W. "Economic Due Process Revisited: Judicial Power and Reform Politics: The Anatomy of *Lochner v. New York*, by Paul Kens." *Vand. L. Rev.* 44 (1991): 213-14.

<sup>95</sup> Kmiec, Keenan D. "The origin and current meanings of judicial activism." *Cal. L. Rev.* 92 (2004): 1445.

<sup>96</sup> Schlesinger, Arthur Meier, *The colonial merchants and the American Revolution, 1763-1776*, No. 182. (Columbia University, 1918): 202, 208.

<sup>97</sup> Ibid. pp. 74-78.

<sup>98</sup> Kmiec, Keenan D. "The origin and current meanings of judicial activism." *Cal. L. Rev.* 92 (2004): 1450-51.

<sup>99</sup> McWhinney, Edward. "The supreme court and the dilemma of judicial policy-making." *Minn. L. Rev.* 39 (1954): 775, 778.

<sup>100</sup> *Theriot v. Mercer*, 262 F.2d 754 (5th Cir. 1959).

<sup>101</sup> Jones, Greg. "Proper Judicial Activism." *Regent UL Rev.* 14 (2001): 141, 143.

<sup>102</sup> Kmiec, Keenan D. "The origin and current meanings of judicial activism." *Cal. L. Rev.* 92 (2004):

Judicial activism is a step forward to its traditional performance of settling disputes in accordance with the constitution or statutes. As a matter of fact, judicial activism is the adoption of pro-active approach by judiciary. It reflects the situation when judiciary comes out of its domain of traditional role and becomes active in its working while lying down the policies and performs functions which otherwise is within the exclusive authority of the executive and the legislature. Another heated debate is to test the extent of judicial activism, whether or not such pro-active judicial functioning is overstepping its circle of authority, assigned by the constitutional framework, which could consequently create judicial anarchy, judicial over activism, or judicial despotism. Like the Indian Constitution, the Constitution of Pakistan does not contain the term judicial activism, however, it has become an integral part of the present day functioning of judiciary.

In *Kesavananda Bharti v. State of Kerala*<sup>103</sup>, the Court held that there are some absolute or basic features of the constitution which shall not be amended: democracy, rule of law, federalism, secularism, and judicial impartiality. The Court further empowered itself to declare such laws, amending the basic structure of the Constitution, to be unconstitutional. The same rule was reiterated in the *Minerva Mills*<sup>104</sup> case. The enunciation of such doctrine, which is not mentioned in the Constitution, is nothing but judicial activism. As a matter of fact, it is an active role judiciary that adjudicates policies enacted by the legislature or the executive.<sup>105</sup> In modern political system, with the development of the concept of constitutionalism, it is considered to be an upshot of democracy. Presently, jurisdictional sphere of

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1463.

<sup>103</sup> AIR 1461 (SC 1973).

<sup>104</sup> AIR 1789 (SC 1980).

<sup>105</sup> Chatterji, Susanta. "For public administration: Is judicial activism really deterrent to legislative anarchy and executive tyranny?" *The Administrator* 42, no. 2 (1997): 9.

judiciary is enlarged to a great extent so that to safeguard individual liberty and social cohesion against undue institutional encroachment.<sup>106</sup>

Judiciary is not confined to interpret the law rather it is empowered to imaginatively share the provision of the constitution, in order to meet the ends of social justice. Judicial activism had its origin in the United States of America at the hands of Justice Marshall in *Marbury v. Madison*<sup>107</sup>, where the Court formed the very basis for judicial review and gave the concept of judicial activism. According to Justice Marshall, the Constitution is basic and supreme law of the land and courts are empowered to declare what the law is. He observed that any enactment which is contrary to the Constitution or competing any provision thereof is invalid and all state organs including courts are required to comply with the Constitution. Where a law made by the congress is conflicting with the Constitution or any part thereof, the Supreme Court shall come forward to declare such law void and to uphold the Constitution.

Justice Bhagwati of India<sup>108</sup> observed that in every political system, judicial activism is an essential attribute of an impartial judiciary. Public Interest Litigations in India and *suo motu* actions in Pakistan has further enlarged the scope of judiciary. Judicial activism is the expanded role of judiciary encompassing an area of the legislative vacuum in the domain of human rights. Since the inception of Pakistan, judiciary has undergone an incredible transformation and is being identified by itself as well as by the people as a last resort.<sup>109</sup>

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<sup>106</sup> Samwal, M. M., and Sunil Khosla. "Judicial activism." *The Indian Journal of Political Science* (2008): 113-126.

<sup>107</sup> *Marbury v. Madison*, 5 U.S. 137, 2 L. Ed. 60, 2 L. Ed. 2d 60 (1803).

<sup>108</sup> Bhat, K. N. "Judges vs Judges." *The Tribune*, December 15 (2007).

<sup>109</sup> *State of Rajasthan v Union of India* (3). 634 AIR 670. (SCC 1979)

## 2.5.2. The Concept of Judicial Activism in the USA

As discussed above, the concept of judicial activism is much older than the term itself. In the USA, its origin can be traced back in the leading case of *Marbury v. Madison*<sup>170</sup>. In December 1800, the third Chief Justice of the USA, Oliver Ellsworth, resigned his office. The President, Adams, who held office till March 4<sup>th</sup>, 1801, nominated his Secretary of State, John Marshall as the chief justice just before a month of his descending from the presidential office. On February 27<sup>th</sup>, 1801, the congress authorized forty-two Justices of Peace for five years. The Senate confirmed those appointments on March 3<sup>rd</sup>, a day before the republicans to take the office. The appointments were made by delivery of the sealed commissions by the Secretary. However, few of those appointments remained undelivered. With the new executive configuration, Jefferson's Secretary of State, refused delivery of the remaining commissions. William Marbury, one of the Justices of Peace whose commission remained undelivered, filed an original action in the Court contending for the mandamus order to compel Madison to deliver the commission, asserted jurisdiction through Section 13 of the Judiciary Act, 1789.

### 2.5.2.1. The US Supreme Court's Observations

The court held that Marbury has the right to the commission. Nevertheless, the law under which relief was sought is unconstitutional so the Court would not confer the right. The Court observed that even executive actions are subject to constitutional restraints, which could be enforced by judiciary. Justice Marshal gave his opinion in terms of three issues: firstly, Marbury's right to have the commission after it was executed and thereby criticized the new administration and the President Jefferson.

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<sup>170</sup> *Marbury v. Madison*, 5 U.S. 137, 2 L. Ed. 60, 2 L. Ed. 2d 60 (1803).

The court might have avoided constitutional issues that the right did not vest until the delivery of the commission. Secondly, the US government being government of laws not of men required a legal remedy for a legal wrong. Marshall further highlighted that individual remedy would be left to political process where the alleged matter is exclusively of political nature or within the exclusive jurisdiction of the executive. Nevertheless, where individual rights are dependent on a duty established by law, there was a remedy which must be enforced judiciously. This argument laid the foundation of judicial review and scope of judicial activism. Thirdly, whether or not Marbury was entitled to the remedy he had applied to the Supreme Court.

Justice Marshall further divided the last issue into two questions concerning the nature of the writ of mandamus and the Court's authority: to the nature of the writ, the Court asserted power of judicial review to the executive branch. The Court inquired as to whether or not mandamus could be enforced against the executive. Marshall founded two categories of the executive actions not subject to judicial review: where the presidential or executive action is purely political or where the matter is within the sole discretion of the executive. Nevertheless, the executive itself cannot limit the power of judicial review. Moreover, where a duty is imposed on the executive by virtue of any federal law or the Constitution, the court can impose and make sure application of that function. In like circumstance, judicial review is not a transgression to the executive branch, rather an inquiry into the alleged illegality.<sup>111</sup>

The Court further analyzed that whether or not the mandamus should be issued in the given case. Marshall founded a conflict between the Court's statutory jurisdiction under the Judiciary Act of 1789 and Article III of the US Constitution. Marshall concluded that the congress might have the authority to alter court's

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<sup>111</sup> Nowak, John E., and Ronald D. Rotunda. *Principles of constitutional law*. West Group, (2007): 3.

jurisdiction, but Article III intended to fix original jurisdiction of the court. This conflict led Marshall to the essential question: status of the conflicting laws with the Constitution and the Supreme Court's authority to invalidate such laws. Marshall observed that the Constitution represents the will of people, coupled with fundamental rule of compelling the government to act according to the spirit of the Constitution, which means that the Constitutional law is the paramount law and any contrary act to the letter and spirit of the Constitution must be held invalid. Judiciary is conferred with responsibility to interpret the law, which is the foundation of judicial review.

Marshall advanced several other points in support of judicial power to declare laws invalid if found inconsistent with the constitution. In the given case, the court was either required to follow statute or the constitution. An inability to reject statute in favour of the constitution would subvert the essence of the written Constitution. The judges' oath also required them to uphold the Constitution. Marshall concluded the case with observations that the Constitution is superior law as envisaged in Article VI, which explicitly declares the Constitution to be the ultimate law and the statutes must be consistent with it. The judges must uphold the laws which are in consonance with the constitution.

The Court while refusing the commission to Marbury held that the original action for mandamus was conflicting with Article III of the Constitution as Section 13 of the Judiciary Act incorporated an unconstitutional provision, hence declared void.

#### **2.5.2.2. Review of the State Laws: Development towards Judicial Activism**

Historically, three decisions of the US Supreme Court are of particular significance that established the federal judicial power over the state laws, and had

further advanced the concept of judicial activism: in *Fletcher v. Peck*<sup>112</sup>, the Court for the first time invalidated a state law under the US Constitution. This case involved a Georgia's statute that sought to annul earlier transfer of land against the bona fide private purchasers who sought enforcement of the contract and ownership rights. A corrupt legislature had authorized these transfers and the state contended to cancel what seemed to be fraudulent acts. The Court held that within the meanings of Article I, the repealing statute was unconstitutional and it was immaterial that the state was grantor. The Court found no distinction between obligation of contracts where it was between private individuals or between the state and an individual.

In *Martin v. Hunter's Lessee*<sup>113</sup>, a former British US citizen, Lord Fairfax, willed his land to his nephew in England, Denny Martin. Later on, Virginia, through an enactment, confiscated land of those who had been the British citizens or their loyal during the war of Revolution. A portion of the alleged land was granted to David Hunter. The representatives of Martin and Hunter contested this case. The highest Court of Virginia and Court of Appeal decided in favour of Hunter and the state. Nevertheless, the US Supreme Court decided in favour of Martin on the ground that the state law is subordinate to federal treaties under the supremacy clause. As contested by Martin's representative on the pretext of the Anti-Confiscated clauses of treaties between the USA and the Great Britain.

In *Cohens v. Virginia*<sup>114</sup>, the state prosecuted persons for the sale of lottery ticket in violation of the state's law. The appellant contented that the act was permitted by a federal statute authorizing a lottery in the District of Columbia. The Court held that the federal act did not protect the accused, but the Court asserted its authority to review state's acts in criminal proceedings. The Court observed that the

<sup>112</sup> *Fletcher v. Peck*, 10 U.S. 87, 3 L. Ed. 162, 3 L. Ed. 2d 162 (1810).

<sup>113</sup> *Martin v. Hunter's Lessee*, 14 U.S. 304, 4 L. Ed. 97, 1816 U.S. L.E.X.I.S. 333 (1816).

<sup>114</sup> *Cohens v. Virginia*, 19 U.S. 264, 5 L. Ed. 257, 5 L. Ed. 2d 257 (1821).

Constitution is paramount and enduring law, often requires enforcement against outside challenges, and federal courts were proper forums for this purpose.

Generally speaking, the state courts are authorized to review the constitutionality of either state laws or federal laws. These courts are bound to enforce and give preference to federal laws over state's acts. Similarly, the US Supreme Court is empowered by the virtue of Article III of the Constitution to reverse the state courts' decisions and the Supreme Court has to be followed even to review the state laws. The Supreme Court is free to interpret state's laws or state constitution in any way not violating principles of federal laws or the US Constitution; in that case, the US Supreme Court must defer to state high court. Further, Article III provides constitutional protection to the judges with lifetime tenure with no diminution of salary, in order to ensure independence of judiciary. The basic statutes governing SC jurisdiction are found in the Title 28 of the US Code. Section 1215 governs original jurisdiction and provides that the US Supreme Court shall hear controversies between two or more states, or where Ambassadors, public ministers, or counsels or vice-counsels of foreign states are parties.

In the US system of government, judiciary's role remained quite controversial.<sup>115</sup> The proponents of judicial activism argue that courts are only insulated from the matters which are exclusively of political nature. In the constitutional context, courts should generally exercise its authority so as to ensure that legislation is in consonance with the constitutional norms.<sup>116</sup> Contrary to this approach, the opponents of this doctrine, proponent of judicial restraints, argue that broad use of judicial power is detrimental to the democratic principles.<sup>117</sup> According

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<sup>115</sup> Berger, Raoul. "Government by judiciary: the transformation of the fourteenth amendment." (1977).

<sup>116</sup> Fiss, Forward. "The Forts of Justice, 92 Harv. L. Rev 1 (1979); Wright, J. Skelly. "Judicial Review and the Equal Protection Clause." Harv. CR-CLL Rev. 15 (1980): 1.

<sup>117</sup> Bickel, Alexander M. *The least dangerous branch: the Supreme Court at the bar of politics.* (Yale

to this approach, the judicial restraint prevents courts from encroaching upon the policy-making functions of political branches of the government.

### 2.5.3. Islamization and Judicial Activism in Pakistan

Several Muslim countries initiated Islamic reforms in 1970s and 1980s. By that time, the legislature have to face so many challenges: establishment of the content of Shariah norms, which by implication is giving precedence to one sources over another and choosing among differing interpretations of these sources.<sup>118</sup> In Pakistan, the Islamization of Shariah law started its roots in the end of 1970s through motivation of the executive and followed in the subsequent decades mainly through judiciary. Some of the Islamic reforms were introduced by the then Prime Minister Zulfiqar Ali Bhutto in the second half of the 1970s. This process was accelerated when General Zia-ul-Haq acceded to power.<sup>119</sup>

Throughout the 19<sup>th</sup> century, Shariah courts were stripped of their jurisdiction by colonial imperialist powers and were replaced with the western judicial system. However, in most of the countries where Islamic laws have been reintroduced, western courts remained functional. While in some cases, new Islamic courts have been setup which continues to function according to the western procedures. Additionally, in exceptional cases their composition remained mixed wherein judges are sitting along with the *ulema* due to an uneasy division of functions.<sup>120</sup> The reforms brought forth by Zia-ul-Haq were very complex and may be categorized into the following three kinds: Structural Reforms, Procedural Reforms, and Criminal Law Reforms. In 1978, High Courts were granted with the original jurisdiction of the

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<sup>118</sup> University Press, 1986): 16.

<sup>119</sup> Giunchi, Elisa. "Islamization and Judicial Activism in Pakistan: What Šari'ah?" *Oriente Moderno* 93, no. 1 (2013): 188.

<sup>119</sup> Ibid. p. 194.

<sup>120</sup> Ibid. p. 190.

Appellate Shariat Benches and were conferred with the authority to entertain Shariat petitions and appeals against Hudood cases.

However, in 1980 the Federal Shariat Court (FSC) was established and the High Court benches were disbanded. Till 1985, provisions regarding the Federal Shariat Court were changed twenty-eight times via twelve distinct Ordinances, in order to make sure that laws are complying with the Islamic injunctions. The FSC was also conferred with limited *suo motu* jurisdiction. In the Procedural Reforms, law of evidence, 1872 was replaced with Qanoon-i-Shahadat Order, 1984. In the Criminal Law Reforms, the President Zia promulgated four Ordinances on 10<sup>th</sup> February 1979 that was collectively termed as Hudood Ordinances; The Zina Ordinance deals with penalty for sex related crimes such as rape, adultery, and prostitution. The Qazaf Ordinance deals with the false allegation of Zina and penalty thereof. The Prohibition Ordinance deals with intoxication and its penalties. The Property Ordinance deals with theft related offences and provides penalties for such crimes.<sup>121</sup>

In mid 1980s, following a brief account of the adoption of Shariah in Pakistan, it is significantly important to examine how Islamization of legal system shifted to judiciary. Due to Zia-ul-Haq's death, Islamization was temporarily interrupted but resumed by Nawaz Sharif who remained the Prime Minister of Pakistan from 1990 – 1993, from 1997 – 1999, and then from 2013 – 2017. In 1991, the enforcement of Shariah Act prescribed that Shariah which defined as the injunctions of Islam was the supreme law of Pakistan. It implies that every law has to be construed by the courts in the light of Shariah and that all Muslim citizens should observe it.

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<sup>121</sup> Kennedy, Charles H. "Islamization in Pakistan: implementation of the Hudood Ordinances." *Asian Survey* 28, no. 3 (1988): 307-308.

#### 2.5.4. Application of Islamic Law through Judiciary

Despite the fact that the concept of Islamization was backed by the executive, it was overwhelmingly continued beyond the government control. In plethora of cases, the Provincial High Courts referred to un-codified principles contained in the Quran, Sunnah, and *fiqh* so as to clarify vague statutory norms. The Courts went to the extent of replacing the codified norms with that of the un-codified Islamic principles. Apparently, it was paradoxical view that judicial activism started in High Courts rather than the newly established Islamic Courts. In fact, judges of the High Courts were younger having more orientation to Islam than those sitting in the appellate Islamic Courts.<sup>122</sup>

In 1970s some judges of the High Courts had claimed that the issues not been dealt with by the statutory law should be decided according to the Shariah Principles rather than referring it to the British precedents. Furthermore, the Objectives Resolution was more than a conventional preface as it embodies the fundamental concepts of the Constitution.<sup>123</sup> Nevertheless, the Supreme Court asserted that technically the Objectives Resolution cannot be considered as an active part of the Constitution.<sup>124</sup> In any case, Islamization of laws could be carried out only by the executive and not by judiciary.<sup>125</sup> In 1985, the situation changed with the adoption of the constitutional amendment whereby Article 2-A made Objective Resolution as a substantive part of the Constitution.<sup>126</sup>

Article 2-A made the Shariah a normative system superior to the statutory system and required that the courts should apply it directly. It was decided that both

<sup>122</sup> Giunchi, Elisa. "Islamization and Judicial Activism in Pakistan: What Šarf'ah?." *Oriente Moderno* 93, no. 1 (2013): 197.

<sup>123</sup> Haji Nizam Khan v. Additional District Judge, PLD 930 (LHC 1976).

<sup>124</sup> State v. Zia-ur-Rehman, PLD 49 (SC 1973).

<sup>125</sup> B. Z. Kkaus v. President of Pakistan, PLD 160 (SC 1980); Federation of Pakistan v. Parishtta, PLD 120 (SC 1981).

<sup>126</sup> Revival of the Constitution of 1973 Order (P.O. XIV 1985).

the High Courts and the Supreme Court could strike down any law as un-Islamic if it is not reserved to the Federal Shariat Court and matters excluded from its jurisdiction would now fall under the jurisdiction of the other courts. This competence was implemented in 1980s in numerous cases heard by the High Courts, pertaining mainly to *Riba* and family laws. The MFLO was one of the main targets of this religiously-oriented judicial activism.<sup>127</sup> In 1988, the Supreme Court for the first time asserted that after incorporation of Article 2-A to the Constitution, no law could prevail over Islamic percepts. However, the areas excluded from its competence could be judged by the High Courts and the Supreme Court. In such cases, their interpretation would have binding effect on the Federal Shariat Court.<sup>128</sup>

The Federal Shariat Court itself has progressively referred to un-codified Shariah principles, especially in cases not covered by the statutory laws.<sup>129</sup> This change contributed entrance of Islamic judges along the judges of modest background. For instance, Tanzil-ur-Rahman, the head of Islamic Ideology Council who was nominated judge of the Sindh High Court in 1986 and after five years alleviated as a judge of the Federal Shariat Court. He actively promoted the idea that the Objectives Resolution had become a supra constitutional norm and that the MFLO was un-Islamic.<sup>130</sup> It was observed that courts could only have a judicial role and the Objectives Resolution could not be considered supra constitutional document nor was itself executory, the judges could directly apply Islamic percepts in subjects not covered by statutory laws.<sup>131</sup> However, in a landmark case of *Zaheer-ud-din v. the*

<sup>127</sup> Giunchi, Elisa. "Islamization and Judicial Activism in Pakistan: What Šari'ah?" *Oriente Moderno* 93, no. 1 (2013): 198.

<sup>128</sup> Muhammad Sarwar and another v. the State, PLD 42 (1988 FSC). The Court reiterated the judgment expressed in Mirza Qazmar Raza vs. Mat. Tahira Begum and Others, PLD 169 (Karachi 1988); Allah Dad v. Mukhtar Ahmad. SCMR1273 (SC 1992).

<sup>129</sup> Muhammad Naseer v. the State, PLD 58 (FSC 1988).

<sup>130</sup> Giunchi, Elisa. "Islamization and Judicial Activism in Pakistan: What Šari'ah?" *Oriente Moderno* 93, no. 1 (2013): 199.

<sup>131</sup> Hakim Khan and Others v. the Government of Pakistan and others, PLD 595 (SC 1992); Mst

*State*<sup>132</sup>, the Supreme Court held that Objectives Resolution is effective and operative even with the suspension of fundamental rights.<sup>133</sup>

Article 2-A has had far reaching effects. Firstly, it has expanded the authority of judiciary vis-à-vis the legislative and the executive bodies. The state having assumed a legislative function unknown to pre-colonial India had to retreat when faced with judicial activism of judges. Secondly, the proactive judiciary eroded the economic interests and ideology against one another, as evident in the case of *riba*. In the instant case, the FSC and the Appellate Shariat Bench of the Supreme Court (ASBSC), following the examples of the High Court rulings, directed the government in 1991 and 1999 respectively to completely revamp the traditional banking and insurance system and thereby to replace all transactions involving *riba* with other instruments. However, the government was reluctant to implement the judgment of the Court for its application could isolate the economy of Pakistan and could discourage foreign investment and capital that consequently could push the fragile economic system of the country to collapse.<sup>134</sup> In 2002, the government filed review petition against the impugned judgment of *riba* in the Supreme Court. Meanwhile, the government also partially changed composition of the judges of the Supreme Court. The Court set aside its previous judgment and remanded the case to the Federal Shariat Court for further examination.<sup>135</sup>

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<sup>132</sup> *Kaneez Farima v. Wali Muhammad and another*, PLD 901 (SC 1993).

<sup>133</sup> *Zahoor-ud-din v. the State*, SCMR 1718 (SC 1993).

<sup>134</sup> *Ibid.*

<sup>134</sup> Giunchi, Elisa. "Islamization and Judicial Activism in Pakistan: What Šari'ah?." *Oriente Moderno* 93, no. 1 (2013): 199.

<sup>135</sup> *Ibid.* p. 200.

### 2.5.5. The Constitutionality of *Suo Motu* Actions

In modern democracies, active and impartial Judiciary is imperative to ensure proper functioning of the state organs. In the Mughal era, Diwan-e-Mazalim was considered to be the highest office in judicial fabric. During the British Raj (1858 – 1947), new judicial configuration was devised in the Subcontinent. After partition in 1947, both India and Pakistan established their own constitutional schemes on the basis of the Government of India Act, 1935. This Act empowered the courts to check constitutionality of the enactments by virtue of Section 223-A. In Pakistan, the Constitution envisages trichotomy of powers whereby every state organ is required to work within its constitutional limits.

The Superior Courts entrenched power of judicial review by virtue of Section 223, 223-A and 204 of 1935 Act. Later on, the Indian Act of 1935 was replaced by the Constitution of 1956 that conferred power of judicial review to the High Courts and the Supreme Court by virtue of Article 170 and Article 22 respectively. In 1958, the Constitution was abrogated by the Chief Martial Law Administrator. Afterwards, the Constitution of 1962 introduced presidential form of government and its Article 98 articulated about judicial review. However, the Constitution of 1962 was replaced with an interim constitution by military dictator. With the consensus of all political parties, the Constitution of Pakistan, 1973 was passed without any substantial lingual changes. In this Constitution, power of judicial review was conferred to the High Courts and the Supreme Court by virtue of Article 199 and 184(3) respectively. The SC in various cases<sup>136</sup> assumed its authority where question of public importance or protection of fundamental rights was involved.

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<sup>136</sup> *Fiji Foundation v. Shamim-ur-Rehman*, PLD 457 (SC 1983); *State v. Zia-ur-Rehman*, PLD 49 (SC 1973); *Abu-ul-ala Maudoodi v. West Pakistan*, PLD 49 (SC 1973).

The Supreme Court by invoking its *suo motu* jurisdiction has broad powers to review an administrative action on various grounds such as if the act is discriminatory, mala fide, or unreasonable. The Court has also been empowered to strike down any legislative enactment or any part thereof if that is repugnant to any provision of the Constitution. Article 184(3) articulated essential conditions for invoking jurisdiction of the Court: question of public importance and matter is associated with the protection and enforcement of fundamental rights.

#### 2.5.6. Test of Judicial Activism: Pakistan a Case Law Study

This segment of the research examines the extent to which judicial activism is a negative element in the constitutional development of Pakistan. Generally speaking, primary function of the state is dispensation of justice. An effective judiciary is subject to its impartiality. The judicial autonomy got international recognition through various conventions such as the UDHR, 1948, the ICCPR, 1976, and 1985 the UN Convention on Prevention of Crimes and Treatment of Offenders. The supremacy of the Constitution is guaranteed through the courts. The Constitution also bestows impartiality of the judiciary. Independent judiciary helps keep every organ working in its constitutionally defined jurisdictional circle. In the US history, *Marbury v. Madison*<sup>137</sup> is an important milestone that created the foundation for Judicial Review. It established the authority for Judicial Review of Congressional and Presidential actions. Further, it declared supremacy of law that even the President is subject to the law. It also articulated that judiciary can award remedy against the executive when a particular duty is imposed on it, but not when a matter of political nature is left on its discretion. A lame and weak judiciary shall be mere a façade as it

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<sup>137</sup> *Marbury v. Madison*, 5 U.S. 137, 2 L. Ed. 60, 2 L. Ed. 2d 60 (1803).

will be subject to political exploitation and rule of law will be undermined in its absence.

The Constitution of Pakistan envisages trichotomy of powers, which enables every state organ to work in its respective sphere. In a federal system of government, judicial review is far more important because it keeps a federation and its units in their limits and does not let them overstep beyond the powers granted under Constitution. A constitutional mechanism is regulated to ensure the impartiality of courts and dignity of its officers. The preamble to the Constitution envisages autonomy of judiciary and disqualifies a Parliamentarian if he/ she defames or ridicules judiciary.<sup>138</sup> Furthermore, the Constitution of Pakistan, 1973 articulated certain provisions in order to ensure the impartiality of courts. These Articles include appointment of the Superior Courts' judges<sup>139</sup>, term of their office<sup>140</sup>, removal from office<sup>141</sup>, Judicial immunity<sup>142</sup>, freedom from Parliamentary criticism<sup>143</sup>, exclusiveness of authority and original jurisdiction of the Supreme Court regarding any dispute between two or more Governments<sup>144</sup>, advisory jurisdiction of the Supreme Court<sup>145</sup>, issuance of decrees, orders, or directions as may be essential for doing complete justice<sup>146</sup>, finality and binding authority of decisions<sup>147</sup> and rules of procedure whereby Superior Courts are authorized to make rules so as to regulate practice and procedure of the Courts.<sup>148</sup>

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<sup>138</sup> Article 63(g) of the Constitution of Pakistan, 1973.

<sup>139</sup> Article 175 (A), 177 of the Constitution of Pakistan, 1973.

<sup>140</sup> Article 179, for the retiring of Judges of Supreme Court at the age of 65 years and Article 195, for the retirement of Judges of the High Court.

<sup>141</sup> Article 209, 210, 211 of the Constitution of Pakistan, 1973.

<sup>142</sup> Article 4 of the Qanun-e-Shahadat Order, 1984.

<sup>143</sup> Article 68 of the Constitution of Pakistan, 1973.

<sup>144</sup> Article 184 of the Constitution of Pakistan, 1973.

<sup>145</sup> Article 186 of the Constitution of Pakistan, 1973.

<sup>146</sup> Article 187 of the Constitution of Pakistan, 1973.

<sup>147</sup> Article 189, 201 of the Constitution of Pakistan and Article 55, 56 of the Qanun-e-Shahadat Order, 1984.

<sup>148</sup> Article 191, 201 of the Constitution of Pakistan, 1973.

Similarly, state functionaries derived their authority from the Constitution and are expected to use their power within the limits prescribed by the Constitution. Public authorities are required to act rationally, independently, and without arbitrariness within the prescribed authority. In case where a person is aggrieved of any administrative action or where protection of fundamental rights is concerned, such person can approach the Superior Courts in order to review the impugned order. In case titled, *Munir Hussain Bhatti v. Federation of Pakistan*<sup>149</sup>, where the Parliamentary Committee refused recommendations of the Judicial Commission regarding the appointment and extension of the four judges of LHC and two judges of the SHC on the pretext that the former represents will of the Parliament. Hence, decision of the Parliamentary Committee cannot be reviewed. It was held that appointment, removal, and term of judges ensure judicial impartiality. The Court observed that it has constitutional right to review decision of the Parliamentary Committee which is working as an executive body and to ensure independence of state organs with a reasonable control.

In case of *Musammat Badshah Begum v. Additional Commissioner Lahore Division*<sup>150</sup>, the Supreme Court observed that the Court has ample power of judicial review in order to make sure just, fair, and reasonable application of law. Further, courts are not bound by the letters of law rather bound by the spirit of law. The rationale behind power of judicial review can be contemplated briefly in the following points:

- a. In order to secure supremacy of the Constitution, power of judicial review has been granted. Courts are guardians of the constitution and do not allow even themselves to override the provisions of the Constitution. Further, courts are

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<sup>149</sup> PLD 407 (SC 2011)

<sup>150</sup> SCMR 629 (SC 2003).

considered to be the first band machinery for the implementation and enforcement of the Constitution. Moreover, if there is conflict of ordinary law and the constitution, the constitution stands upright and the law is declared void. In case of *Sayed Abul Ala Maudoodi v. Government of West Pakistan*<sup>151</sup>, the Supreme Court held that the Constitution is supreme and it has to prevail over the ordinary law. This is possible only when the authority of judicial review is admitted.

- b. It is a tool to uphold rule of law by interpreting the Constitution and ordinary laws as well as it ensures protection of rights and liberties to all individuals against undue interference. It means that judicial review stands for equal protection of law and equality before law as provided by Article 4 and 25 of the Constitution of Pakistan, 1973 respectively.
- c. Judicial Review is meant to secure rights of people and has come to play a vital role to rescue people from the abuse of authority being exercised by public functionaries. The underlying objectives of Article 199 are summed up in the case of *Muhammad Basher v. Abdul Kareem*<sup>152</sup>. The Court observed that it is duty of the Court to protect fundamental rights of the people, to act and aid the law, and to protect the law and Constitution against exploitation by the state functionaries. Further, it is duty of the Court to strike a fair balance so as to create a rational compromise of state functionaries with the rights of citizens.

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<sup>151</sup> PLD 673 (SC 1964).

<sup>152</sup> PLD 271 (SC 2004).

### 2.5.6.1. Authoritarian Regimes and Judicial Functioning

Generally speaking, courts are expected to independently and impartially perform its functions with the limits prescribed by the Constitution. In certain exceptional circumstances, such as military regimes, courts are required to expand its jurisdictional sphere. Despite the independent status of judiciary, the political regime holds control on it by various means such as judicial appointments, financial incentives, and in the matters of legal and constitutional changes. The courts are, therefore, considered to be the agents of political regimes.<sup>153</sup> In authoritarian pretext, focus is made on the expansion of courts' power and their independence.<sup>154</sup> *Ginsburg and Mustafa* articulated five essential functions of the courts in dictatorial regimes; firstly, administrative control over executive for addressing low-level corruption. Judges allow investigation into bureaucratic misdeeds that otherwise cannot be discovered by the regime.<sup>155</sup>

Secondly, application of controversial policy measures, especially in the economic realm. Thirdly, for the economic survival of the authoritarian regime, foreign and domestic investments are encouraged but due to fluctuation in property rights investors rarely take the risk of the investment. Fourthly, courts are being used in the authoritarian regimes in order to regulate a social control over the political opponents. Fifthly, courts are employed for providing legal cover to the extra-legal activities of the regime. In order to provide justification to the regime, courts develop justifications for constitutional deviations.<sup>156</sup>

<sup>153</sup> Dahl, Robert A. "Decision-making in a democracy: The Supreme Court as a national policy-maker." *J. Pub. L.* 6 (1957): 279-95; Shapiro, Martin. *Courts: a comparative and political analysis*. (University of Chicago Press, 2013).

<sup>154</sup> Ginsburg, Tom, and Tamir Moustafa. *Rule by law: the politics of courts in authoritarian regimes*. (2008); Helmke, Gretchen, and Frances Rosenbluth. "Regimes and the rule of law: Judicial independence in comparative perspective." *Annual Review of Political Science* 12 (2009): 345-66.

<sup>155</sup> Shapiro, Martin. *Courts: a comparative and political analysis*. University of Chicago Press, 2013.

<sup>156</sup> Mahmud, Tayyab. "Jurisprudence of Successful Treason: Coup d'Etat & (and) Common Law." *Cornell Int'l LJ* 27 (1994): 49.

The next segment examined the extent to which the courts followed the above mentioned functions and to which extent the courts diverged from them while expanding judicial powers. The Supreme Court in the exercise of its *suo motu* jurisdiction cancelled the agreements and process of privatization of public enterprises instead of endorsing them.<sup>157</sup> The Court directed investigation of missing persons instead of supporting and upholding the regime. Once the Court assumed maximum power, jeopardizes the legitimacy of the regime instead of its reinforcement.<sup>158</sup> The SC has constitutional authority to review matters of public importance concerning the protection of fundamental rights. The Parliament determines numbers of the Supreme Court judges. In Musharraf reign, it was set to be seventeen.

Before 18<sup>th</sup> amendment to the Constitution, the Supreme Court judges were appointed by the President on recommendations of the Chief Justice.<sup>159</sup> Whereas, the most senior judge among the Supreme Court judges was elevated to the office of the Chief Justice.<sup>160</sup> The President had constitutional authority to remove a judge either on account of misconduct or where a judge was otherwise incompetent to continue his duty. Nonetheless, the President has not been expressly empowered by the Constitution to suspend a judge before the conclusion of the inquiry. The Chief Justice plays a significant role in the Court's jurisprudential development and approves *suo motu* actions.<sup>161</sup>

After the Military takeover in 1999, Iftikhar Muhammad Chaudhry was among the handpicked judges of Musharraf by replacing six judges who refused to

<sup>157</sup> Root, Hilton L., and Karen May. "Judicial systems and authoritarian transitions." *The Pakistan Development Review*(2006): 1301-1321.

<sup>158</sup> Ghias, Shoaib A. "Miscarriage of chief justice: judicial power and the legal complex in Pakistan under Musharraf." *Law & Social Inquiry* 35, no. 4 (2010): 988.

<sup>159</sup> Al-Jehad Trust v. Federation of Pakistan, PLD 324 (SC 1996).

<sup>160</sup> Asad Ali v. Federation of Pakistan, PLD 161(SC 1998).

<sup>161</sup> Ghias, Shoaib A. "Miscarriage of chief justice: judicial power and the legal complex in Pakistan under Musharraf." *Law & Social Inquiry* 35, no. 4 (2010): 988.

take oath under the PCO. Iftikhar Muhammad Chaudhry was one of the twelve judges who validated the coup on the ground of necessity.<sup>162</sup> He was one of the nine members bench upholding extra-constitutional referendum in order to become a President.<sup>163</sup> He was a member of the bench upholding Musharraf's amendment to the Constitution.<sup>164</sup> He was also among five members bench whereby Musharraf was allowed to hold office of the Army Chief in his first Presidential term.<sup>165</sup> In June 2005, Iftikhar Chaudhry was promoted as the Chief Justice of Pakistan who performed functions in authoritarian context.

#### **2.5.6.2. Judicialization of Governance**

The first and foremost question that how did a pro-regime judiciary expanded authority that led to the confrontation with the regime. Typically, as discussed, in authoritarian situations the Supreme Court legitimized the military regimes. In the present context, the economic liberalization and privatization created room for public interest litigations. The Supreme Court enhanced its jurisdictional circle of authority and impartiality that consequently created backlash to Musharraf's interests. Invoking original jurisdiction in matters of public interest litigations was not a novel concept, but the Court provided some additional measures, in order to make some unprecedented developments towards its autonomy. By expanding its authority, the Human Rights Cell was also established in the SC. A chronological analysis of public interest litigations helps understand how the Supreme Court diverged from the anticipated judicial role in dictatorial regimes.

<sup>162</sup> *Zafar Ali Shah v. General Pervez Musharraf*, PLD 869 (SC 2000).

<sup>163</sup> *Qazi Hussain Ahmad v. General Pervez Musharraf*, PLD 853 (SC 2002).

<sup>164</sup> *Watan Party v. Chief Executive of Pakistan*, PLD 74 (SC 2003)

<sup>165</sup> *Pakistan Lawyers Forum v. Federation of Pakistan*, PLD 719 (SC 2005)

In Musharraf's era, economic growth was evident that required high rise office space and housing. Nonetheless, urban planning and safety measures had not been advanced accordingly. After catastrophic earthquake of October 2005, the inhabitants of a collapsed building, which was located in Islamabad, filed a petition against the construction company and the CDA. The applicants contended that the CDA could not protect their lives and properties despite repeated complains about material defect in the tower. The CDA was directed by the Court to investigate the responsible persons for defective construction and further directed to provide accommodation to the concerned residents.<sup>166</sup>

After two months, the Court while converting the same petition into a high level of judicial investigation directed the Provincial officials to submit a report regarding damage to the schools, colleges, and universities due to earthquake. The authorities were further directed to provide details of any action so far taken against the responsible persons for defective construction. In another case, the Supreme Court, in April 2006, heard an appeal against the order of the Lahore High Court, which had forbear the LDA for permitting construction of buildings without meeting the required safety standards. The Court unveiled that the LDA had no structural engineer for ensuring structural safety.

Similarly in February 2006, the Court took a petition against the CDA. The Petition moved the Court to prevent the CDA from making a lease agreement for golf course that was to be constructed in a public park. The Court observed that the proposed agreement violated fundamental right of access to public places as guaranteed by Article 26 of the Constitution of Pakistan, 1973.<sup>167</sup> On the same grounds, the SC took *suo motu* in number of cases with reference to commercial

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<sup>166</sup> *Saad Mazhar v. Capital Development Authority*, SCMR 1973 (SC 2005).

<sup>167</sup> *Moulvi Iqbal Haider v. Capital Development Authority*, PLD 394 (SC 2006)

projects and public spaces in Lahore and Karachi. These were some of the examples that how the Court kept surveillance and control over high level corruption that created room for the judicial intervention, while expanding its authority in the context of fundamental rights.

After urban planning, the Court expanded its jurisdictional circle in deregulation of price control. The Court intervened in price control of oil and sugar. In order to set price of petroleum, the Ministry of Petroleum had authorized a group of oil companies, which was termed as the Oil Companies Advisory Committee (OCAC), without any parliamentary oversight. With the escalation of oil price to US\$70/ per barrel in international market, the OCAC increased the prices accordingly. However, when the oil price decreased to US \$62 the OCAC didn't reduce the prices correspondingly. In May 2006, the Supreme Court took the petition and directed the National Accountability Bureau to probe into the matter.<sup>168</sup> After initial hearing, this case was referred to a larger bench to investigate the involvement of officers from the Ministry of Petroleum for having collaboration with the OCAC in order to fix an unfair rate.<sup>169</sup>

Likewise, the Court took cognizance of sugar price hike, which was recorded double in less than a year. The Supreme Court directed the NAB to investigate the matter properly. In its report, after conclusion of the investigation, the NAB implicated the involvement of eight Ministers and further declared that governmental soft policy was claimed to be the reason for sugar crisis. These price control cases targeted high level corruption that further exposed the despotic regime. This initiative

<sup>168</sup> Goraya, M. Rafiq, "Supreme Court Calls NAB Report in Oil Price Hike Petitions," *Business Recorder*, May 24 (2006).

<sup>169</sup> Ghias, Shoaib A., "Miscarriage of chief justice: judicial power and the legal complex in Pakistan under Musharraf," *Law & Social Inquiry* 35, no. 4 (2010): 993.

of price control got motivation from media and the NAB's compliance to the orders gave confidence to the Supreme Court for expansion of its authority.

After price control, the Court took an account of privatization of public enterprises. In 2005, keeping in view the economic liberalization policy, the government privatized public enterprises mainly with the support of Citibank. These enterprises included Pakistan State Oil (PSO), Pakistan Telecommunication Ltd. (PTCL), and Pakistan Steel Mills (PSM). The Labor Union threatened to destroy the telecom facility when their demands were not considered by the government. Consequently, Army had to be involved for security of infrastructure. Likewise, in April 2006, the PSM was privatized on the same political grounds. The opposition and the Labor Union leveled corruption charges against the Privatization Commission. In August 2007, the Court while reversing the sale agreement annulled the agreement regarding share purchase and acceptance of the deal.<sup>170</sup> Subsequently, the Court took an account of the PTCL and the PSO despite its accepted position. Considering the vitality of the nature of the cases, the PSM case is considered to be the turning point and principal factor of regime conflict with the Court. The Supreme Court was expanding its ambit of authority by terminating the contracts on the ground of corruption charges instead of enforcing the contracts and supporting the FDI.

After taking an account of privatization of public enterprises, the Supreme Court took *suo motu* against missing persons. In November 2006, the Court while taking notice of the forty-one disappearances directed the Ministry of Interior to produce them. After a month, the Supreme Court was informed by the officials that twenty persons have been recovered. The Court gave directions to trace rest of the missing persons. In November 2007, the Human Rights Commission of Pakistan

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<sup>170</sup> Watan Party v. Federation of Pakistan, PLD 697 (SC 2006)

provided another list of 148 missing persons to the Supreme Court and alleged that the agencies are behind those disappearances. A Bench of the Supreme Court, headed by the Chief Justice, took the petition and sent notices thereof to Federal and Provincial Governments. Nevertheless, by the very next day Chief Justice was suspended from his office. Conceivably, the Court had gone too far by expanding its ambit of authority to intelligence agencies. The Court was enhancing its authority by taking an account of disappearances. Civil society and media were encouraging the Court.

The most challenging task for the Supreme Court was regarding eligibility of Musharraf for contesting the Presidential election while serving the military.<sup>171</sup> For dual office, Musharraf has already got one time exception in 2002 by amending the Constitution, which was upheld by the Supreme Court. Keeping in view activist posture of the Supreme Court, Musharraf could hardly rely on the Court for making constitutional arrangements so that to legitimize his ability for contesting presidential election of October 2007.<sup>172</sup> The Supreme Court had evidently confronted essential regime policies and thereby challenged the high officers of the regime in every consecutive case. Also, there were reports regarding the Court moving ahead as per anticipations of civil society and media, in order to decide Musharraf's eligibility. On this apprehension, the Chief Justice was suspended on March 9, 2007 on the corruption charges and was manhandled by police officials. These incidents created an extraordinary mobilization of the legal fraternity to reinstate the deposed Chief Justice to his office. After struggle of four months, Iftikhar Chaudhry was reinstated. In October 2007, when Musharraf stood for Presidential elections, the Court withheld the results to review the fact of his being a Presidential contestant while serving the

<sup>171</sup> Ghias, Shoaib A. "Miscarriage of chief justice: judicial power and the legal complex in Pakistan under Musharraf," *Law & Social Inquiry* 35, no. 4 (2010): 995.

<sup>172</sup> Ibid. p. 996.

army. Nevertheless, the Constitution was suspended prior to the decision and emergency was proclaimed.<sup>173</sup>

#### 2.5.7. The Determinants of Judicial Power

The economic liberalization and its discontents are considered to be the primary factor that allowed the Court to expand its authority by challenging the economic policies of the regime. After September 11, 2001, Pakistan underwent a rapid economic growth mainly due to FDI and the US military funding.<sup>174</sup> In order to get the economic goals, the economic liberalization policies were aggressively implemented.<sup>175</sup> These policies have consequently created new avenues and techniques for corruption that created new governance challenges. The privatization of public enterprises such as the PSO, the PTCL, and the PSM were creating corruption scandals. This economic growth, which was coupled with corruption, ultimately provided an opportunity to the Court for expansion of its authority since impartial courts are meaningful for combating ground-level corruption. The Court working on the same line, kept a check on the investors, cancelled their contracts, and unveiled the regime for its unexpected financial outcomes. Initially, the Court was tolerated by the regime for its political functions in favor of the latter. On the contrary, once the Court empowered itself, it began to dismantle social control of the regime and created a threat for the legitimization of the regime.

Supportive media was another factor for confrontation with the regime. Throughout the political history of Pakistan, the Supreme Court has mostly legitimized political authority of the regime that resultantly failed to repose a positive

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<sup>173</sup> Ibid. p. 986.

<sup>174</sup> Shah, Aqil. "Aiding Authoritarianism? Donors, Dollars and Dictators". "Charles Kennedy and Cynthia Botteron, *Pakistan2005* (2006): 51-81.

<sup>175</sup> Musharraf, Pervez. *In the line of fire: A memoir*. Simon and Schuster. (Karachi: Oxford University Press 2006):1999-2006.

public image in judiciary. With the expending scope of the *suo motu* cases, people and media started trusting judiciary. The Chief justice also showed deep concerns in this regard. In 2006, the Court incorporated a section named as "Supreme Court and Media", comprising eighteen reports on the Court's achievements.<sup>176</sup> Nevertheless, the critics to such judicial activism considered this tactics as a "Media Circus" by alleging that the Chief Justice is utilizing *suo motu* action for self-aggrandizement.

Strategic judge and regional influence are other important factors. For materialization of public interest litigations cases, the role of the Chief Justice was perhaps necessary condition in this regard. In India, public interest litigations have a long standing tradition that might have inspired the Supreme Court of Pakistan as well. Additionally, petitioners were referring to Indian case law in the domain of public interest litigation to further scope of its jurisprudence. In 2005, Y.K. Sabharwal, the Chief Justice of India, also hosted a delegation of the High Court judges from Pakistan. Pakistani media also reported superior judiciary's role in urban issues and Pakistan print media also started comparison of India and Pakistan in the domain of public interest litigation.<sup>177</sup>

Regime compliance is one of the significant factors in expanding judicial powers. Despite the fact, primary function of the Court during the authoritarian regime is to provide legality to the ruling regime. Nevertheless, in this process of legalism, the Courts also crave out some judicial powers.<sup>178</sup> Furthermore, the regime was not oblivious of the fact that the Court validating everything legalizes nothing. For enhancing credibility of the Court and reposing public trust in the regime as well

<sup>176</sup> Shah, Aqil. "Aiding Authoritarianism? Donors, Dollars and Dictators". *Charles Kennedy and Cynthia Bottneron, Pakistan2005* (2006): 998.

<sup>177</sup> Cowasjee, Ardesir. "Anything They Can Do, We Can Do Better," *Dawn*, April 2 (2006). <http://www.dawn.com/weekly/cowas/20060402.html>.

<sup>178</sup> Lau, Martin. "London-Leiden Series on Law, Administration and Development: The Role of Islam in the Legal System of Pakistan." (2006):75-94; Newberg, Paula R. *Judging the state: courts and constitutional politics in Pakistan*. Vol. 59. (Cambridge University Press, 2002).

as in judiciary, the regime complies with the Orders of the Court. Moreover, judicial credibility was significantly important for Musharraf in order to get license for the upcoming Presidential election. Most importantly, Musharraf couldn't realize this threat of judicial activism until implication of his Prime Minister in the PSM case and involvement of the director of intelligence in missing persons' case. Musharraf was overly confident to the extent that he could compel the Chief Justice to resign from his office.<sup>179</sup>

#### **2.5.8. The Virtuous Cycle of Judicial Power**

This segment investigates that how a handpicked court of Musharraf that served with loyalty till 2005 in legalizing every extra-constitutional measure, turned into a threat to the very existence of the regime. The judicial empowerment that resulted in confrontation with the regime can be analyzed with the sequential examination of the Supreme Court cases and persons implicated therein. The Court encountered the authoritarian regime in a very systematic way. In late 2005, the Court started with implication of Provincial Officers in the urban planning cases. Subsequently, in early 2006 Federal Ministers were implicated in price regulation cases. Another blow was given to the regime in privatization cases whereby the sitting Prime Minister, Shaukat Aziz, was implicated in the mid of 2006. Likewise, in the missing persons and illegal detention cases the army and the intelligence agencies were implicated in late 2006. Finally, Musharraf was implicated in the issue with reference to Presidential elections that came to fore in 2007. In every case, the Court was deciding against the more powerful officer than the previous case. The Court strategically moved from provincial officers to federal ministers, then Pak army as

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<sup>179</sup> Ghias, Shoaib A. "Miscarriage of chief justice: judicial power and the legal complex in Pakistan under Musharraf." *Law & Social Inquiry* 35, no. 4 (2010): 1000.

well as intelligence agencies and finally challenged office of the president. With each step, the Court was encouraged by media and civil society.<sup>180</sup>

Constitutionally, as envisaged through the trichotomy of powers, judiciary is expected to exercise its authority within its jurisdictional sphere and not to interfere in the affairs of the other organs. In case titled, *Dr. Mubashar Hussain v. Federation*<sup>181</sup>, the Court has observed that the Constitution provides trichotomy of powers. The legislature is conferred with the authority to enact laws. The execution and interpretation of these laws have been assigned to the executive and the judiciary respectively. Further, no state organ is expected to transgress in the others' field. Particularly, the courts have been reluctant to interfere in the matters relevant to structure and organization of the political institutions. The Court further held that courts should strictly comply with the limits imposed on them by the Constitution as envisaged by Article 175 of the Constitution: establishment of the courts, its jurisdiction, and its separation from the executive. The Judges are considered to be the custodians of the Constitution.

A constitutional judge must ensure that the Court does not assume political authority and must show regard to the modern trends of the welfare state. A constitutional judge must restrain himself as illustrated by *Mr. Justice Stone* that the only control on our authority is our own sense of self-restraint. *Mr. Justice Frank* elucidated that the indispensable judicial requisite is intellectual humility.<sup>182</sup> Moreover, in *Fazlul Qadir Cahduhary v. Abdul Haq*<sup>183</sup>, the Supreme Court elaborated that judges of the Superior Courts declare in their oath that they shall preserve, protect, and defend the Constitution. The same view was reiterated in the

<sup>180</sup> Ibid, p.p. 1000, 1001.

<sup>181</sup> PLD 265 (SC 2010).

<sup>182</sup> Nova, Fritz. "Political Innovation of the West German Federal Constitutional Court: The State of Discussion on Judicial Review," *American Political Science Review* 70, no. 1 (1976): 12.

<sup>183</sup> PLD 486 (SC 1963).

case of *State v. Zia ur Rahman*<sup>184</sup>, the Court observed that the SC is created by the Constitution. It is neither above the Constitution nor can invalidate or challenge any of its provisions. The Court obtained its jurisdictional authority from the Constitution so it will circumscribe itself to its defined limits. Further, the judges while taking oath, undertake to protect, preserve, and interpret the Constitution so as to elaborate what does or what does not a particular provision means even if it oust jurisdiction of this Court. The ultimate purpose of judiciary is to resolve disputes not to create disputes. Hence, the line between the use and misuse of power must be kept widened and much cleared.

## 2.6. CRITIQUE

To conclude with, constitutionalism is a mechanism whereby the state affairs are governed by a fundamental law that may be referred to as a constitution. Contrary to the concept of authoritarian government, where powers are concentrated in a single body and there always exists the apprehension of the authority being misused. The constitutionalism deals not only with the kinds and procedure of the governance, rather it provides a platform for regulating, constraining, and transferring of the state's authority. In a democratic form of government, the will of people is represented by constitution that creates, organizes, and elaborates jurisdictional authority of the government.

In order to conceptualize the idea of constitutionalism, it has been divided into particular and general constitutionalism and explicit and implicit constitutionalism. Constitutionalists often believe on proper and improper use of authority, expecting the state authority to confine to the former one. Conversely, the actions may be

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<sup>184</sup> PLD 49 (SC 1973).

prohibited, permitted, or required. So, a constitution must provide arrangements to make sure that the government performs what it is required to do so that to ensure that it is restrained from prohibited acts. In democratic configuration of government where state affairs are evenly distributed among the state organs ensures constitutionalism which establishes a state governed by rule of law.

Thomas Hobbes and John Locke promoted the ideas of unlimited sovereignty and sovereignty limited by social agreement respectively. Austin supported the idea of unlimited sovereignty. For Muslims, the ultimate sovereignty belongs to Allah and transferred to the people as a sacred trust. People surrendered their will in the form of a social agreement commonly known as constitution. For western community, the concept of sovereignty is as old as the concept of cavemen. Judicial activism is an essential attribute of impartial judiciary. It is the expansion of authority to the area of legislative vacuum. In the USA, this concept can be referred to *Marbury v. Madison* case where the US Supreme Court formed basis for judicial review and also gave the concept of judicial activism. In Pakistan, this concept can be traced back to the Indian Act, 1935 that was adopted by Pakistan. Section 223, 223-A, and 204 of the Act were about judicial review. Similarly, Article 170 and 22 of the 1956 Constitution, Article 98 of the 1962 Constitution and Article 199 and Article 184(3) of the Constitution of 1973 conferred power of judicial review to the High Courts and the Supreme Court respectively. Islamization of laws played a significant role in this regard. The ASBSC was entrusted with limited *suo motu* jurisdiction for ensuring conformity of laws with the Islamic injunctions. Later on, High Courts went to the extent of replacing codified laws with that of un-codified Islamic principles. Before Article 2-A, the Court developed a consensus that the executive only could carry out Islamization of laws.

However, Article 2-A made Shariah superior as compare to statutory system and required the courts to apply this directly.

Despite the independent status of judiciary, political regimes hold control on judiciary by various means such as appointment and financial interests so judiciary is considered to be the agent of the political regime. In like circumstances, judiciary may tend to work in the authoritarian context because in regime control judicial authority is expanded and relatively impartial. After military takeover of 1999, Iftikhar Chaudhry was one of Musharraf's favorite judges who validated every extra-constitutional act of the regime until June 2000 when he assumed office of the Chief Justice. By judicialization of governance, a pro-authoritarian regime started confrontation with the regime.

Finally, the court implicated Musharraf for contesting presidential election while serving the Army. However, the Chief Justice, Iftikhar Chaudhry, was suspended in March 2007. In October 2007, the Court withheld results of the Presidential election so that to review fate of Musharraf for the presidential election, but emergency was imposed before the decision of the Court. To all this transformation of authority from regime legitimization to political liberalization, there were so many contributing determinants.

## **Chapter No. 03**

### **TRICHOTOMY OF POWERS AND INSTITUTIONAL DISEQUILIBRIUM**

In modern democratic states, the state authority, for regulating state's affairs, has been divided into three organs, where each organ is entrusted to perform its functions in its constitutionally designated area. These democracies also envisaged a mechanism of checks and balances, in order to keep a reasonable control on the affairs of other state organs. In developing countries, these norms are not well established and consequently create apprehension of confrontation and disequilibrium among state organs. Unlike developed countries, Pakistan has been oscillated between authoritarianism and democracy. Despite the fact that the judiciary plays a vital role and is considered to be a prerequisite for successful democratic transition, judicial involvement in political matters is not an ultimate solution to all the risks attached with democratic transition. This chapter examines that how excessive judicial activism could adversely affect the constitutional development of Pakistan and necessitates a balanced judicial approach. With the restoration of democracy in Pakistan, a number of incidents between judiciary and Parliament raised concerns that judiciary which got famous for invalidating the regime invoking similar idea of judicial autonomy from the representative institution in a way that undermines democracy and constitutionalism.

#### **3.1. JUDICIARY – A CATALYST OF MILITARY REGIMES**

Pakistan's recent move towards democracy offers prospects for enduring democracy and constitutionalism. Despite the fact that these challenges remained significant obstacles in realization of the potential threats, there is a need for striking a rational compromise between judicial independence and its constraints considering

the judiciary role in the whole transition. Moreover, the representative institutions are required to effectively enhance their governance capabilities to rein in military and devise a mechanism for ensuring judicial autonomy and accountability in order to reinforce and streamline judiciary's role. A sequential constitutional change creates prospects of transformation from authoritarianism to a democratic system having rule of law and constitutionalism.<sup>185</sup> In the authoritarian regimes, scholars have significantly contributed literature regarding courts' role and considered their existence in transition of a gray zone between the regime and civilian rule. Within this gray zone, focus has been made on judicial impartiality and constitutional developments.<sup>186</sup> Despite this fact, Pakistan has been oscillating for decades between military regimes and fragile democracy. Recent events, however, created a more complex image.

In 2007, judiciary asserted an unprecedented autonomy from the regime during lawyers' movement against Musharraf's efforts to remove the Chief Justice. In the constitutional development of Pakistan, these efforts turned out to be a movement for democracy and constitutionalism. However, after restoration of democracy in 2008, consequential conflicts among Parliament, Judiciary and Military raised concerns that judiciary which was broadly celebrated for challenging Musharraf's regime is undermining civilian government while evoking the notion of judicial autonomy.<sup>187</sup> In order to have an adequate approach to judicial impartiality, both in descriptive as well as normative context, there is a need of deeper contextualized

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<sup>185</sup> Kalhan, Anil. "'Gray Zone' Constitutionalism and the Dilemma of Judicial Independence in Pakistan." vol. 46, no. 1 (2013): 3.

<sup>186</sup> Ibid. p. 5.

<sup>187</sup> Chief Justice Iftikhar Muhammad Chaudhry. (Nov.19,2008), <http://watandoi.blogspot.com/2008/11/deposed-chief-justice-iftikhar.html>, Speech Given upon Acceptance of Harvard Law School Association's Medal of Freedom.

approach to its impartiality in contrast to its typically invoked principles.<sup>188</sup> Judicial impartiality neither entails maximum autonomy nor an end in itself rather it arises from its relationship and interdependencies.<sup>189</sup> In the given context, judicial autonomy requires to strike a rational compromise between judicial impartiality and judicial constraints.<sup>190</sup>

A deeper understanding of the judicial impartiality also necessitates consideration to shifting regimes and how laws, institutions, and associated interests developed eventually.<sup>191</sup> These issues need further critical analysis as the existing scholarship has not fully addressed Pakistan's issues of constitutionalism and role of judiciary. In the broader context, a significant literature contributes how military has utilized judiciary in order to entrench its authority.<sup>192</sup> Furthermore, a considerable aspect of judiciary's role in the representative governments has also been discussed.<sup>193</sup> Nevertheless, the recent literature in Pakistan has not significantly taken into account the implication of the relationship between the regimes and representative rule for judicial impartiality and constitutionalism.

The evolution of alternative governance between military and civilian rule resulted in institutional disparity among state institutions that consequently

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<sup>188</sup> Burbank, Stephen B. "The architecture of judicial independence." *S. Cal. L. Rev.* 72 (1998):340.; Schuck, Peter H. "Part I Courts, Institutions, and Access to Justice: Courts in a Democracy." *Jindal Global L. Rev.* 1 (2009): 7-8.

<sup>189</sup> Burbank, Stephen B., and Barry Friedman. *Judicial independence at the crossroads: an interdisciplinary approach*. Sage, (2002):10-14; Ferejohn, John A., and Larry D. Kramer. "Independent judges, dependent judiciary: Institutionalizing judicial restraint." *NYuL Rev.* 77 (2002): 263-64.

<sup>190</sup> Kalhan, Anil. "Gray Zone'Constitutionalism and the Dilemma of Judicial Independence in Pakistan." (2013): 8.

<sup>191</sup> Fiss, Owen M. "The limits of judicial independence." *The University of Miami Inter-American Law Review* (1993): 83-86.

<sup>192</sup> Mahmud, Tayyab. "Prætorianism and common law in post-colonial settings: judicial responses to constitutional breakdowns in Pakistan." *Utah L. Rev.* (1993): 1244-45.

<sup>193</sup> Khan, Maryam, and Osama Siddique. "The 2005 South Asian Earthquake: Natural Calamity or Failure of State?: State Liability and Remedies for Victims of Defective Construction in Pakistan." *Australian Journal of Asian Law* 9, no. 2 (2007): 215-28; Lau, Martin. "London-Leiden Series on Law, Administration and Development: The Role of Islam in the Legal System of Pakistan." (2006): 103-05.

strengthened Pakistan's unelected institutions at the expense of elected ones. Due to this institutional imbalance, constitutional development and apprehension of democratic consolidation has been hindered. The military and its affiliates have expanded authority into periods of representative governments where law and courts played a key role. The courts legalized military interventions and permitted constitutional changes which helped military preserve its control. Even after restoration of the representative government, judiciary has equally facilitated military's continued political influence, which turned out to be an institutional imbalance. Periodically, judiciary has been able to assert its independence from fragile representative institution, but remained vulnerable to military and its associated interests. In 1990s, during the period of civilian rule to which *Hussain Haqqani* described as "military rule by other means".<sup>194</sup> This institutional relationship led to confrontation between Parliament and judiciary, which leaved adverse affects on both the institutions, and enabled military intervention in 1999. Nevertheless, the entrenchment process has never remained unchallenged.

In 2005, the Supreme Court asserted exceptional autonomy from Musharraf's regime. The regime tried to keep control of the Court, however, achieved little success. Nevertheless, an anti-Musharraf movement was successfully triggered. The struggle towards judicial independence encompassed efforts for restoration of democracy, supremacy of civilian rule, and constitutionalism. The efforts for rolling back the legacy of military's governance also created confrontation between Judiciary and Parliament. The court not only repudiated its long standing role of legitimizing the regime, but asserted its autonomy from Parliament. A unanimously adopted 18<sup>th</sup> amendment to the Constitution brought forth more than 100 constitutional changes

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<sup>194</sup> Hussain, Haqqani. "Pakistan: Between Mosque and Military." (2010). 199

including scope of Article 6, which has been widened and repudiated the military's rule, restore Parliamentary supremacy, provincial autonomy, and reforms in judicial appointments. Over its autonomy, judiciary started confrontation with Parliament, and both have strived to attain a "*Modus Vivendi*"<sup>195</sup> that enhances a shared compromise to constitutionalism. The Supreme Court invalidated provisions of 18<sup>th</sup> amendment due to its incompatibility with the basic structure of the Constitution, without expressly establishing the same. On the motivation of military and opposition, the Supreme Court privileged national security matters over fundamental rights, while upholding military courts. Keeping in view institutional disequilibrium, a reasonable rebalancing of judicial autonomy is required. Besides this, a mechanism for judicial accountability is required that would enable representative government, in order to strengthen its governance capabilities and authority to rein in military and its associated interests.

### **3.2. THEORY OF TRANSFORMATIVE PRESERVATION VIS-À-VIS INSTITUTIONAL DISEQUILIBRIUM**

In 2011, after a long struggle for restoration of democracy, again there were rumors regarding imminent coup creating prospects of replacing the democratic system with that of military regime. *Yousaf Raza Gilani*, the then Prime Minister of Pakistan, communicated to the military not to treat itself as "a state within a state" and insisted that like any other governmental agency, military must remain answerable to Parliament. Nonetheless, civilian government can barely control military because the latter had already operated as a state within a state.<sup>196</sup> This segment examines the

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<sup>195</sup> *Modus Vivendi* is a Latin phrase which means mode of living and referred to an arrangement that allows the conflicting parties to coexist in peace.

<sup>196</sup> Fair, C. Christine. "Pakistan's Democracy: The Army's Quarry? Nawaz, Shuja, Crossed Swords: Pakistan, Its Army, and the Wars Within (New York: Oxford University Press, 2008). 600 pages.

extensive role of military which is beyond its institutional limits and highlights how judiciary facilitated that dominance. The following issues have been categorically addressed:

Firstly, various means whereby the regime has entrenched a potential hegemonic authority during its direct reign that has lasted during periods of civilian rule. Secondly, how law and courts have justified military influence even in formally civilian rule. Lastly, it has been examined that how judiciary asserted its autonomy from fragile representative government, how judiciary remained controlled by military, and how all this contributed to institutional imbalance.

### **3.2.1. From Colonial Viceregal Form of Government to Authoritarianism**

Since its inception, the democratic system in Pakistan has not remained strongly intact rather oscillated between two constitutional models: a colonial state system that emphasizes concentration of powers and support presidential form of government which may be referred as viceregal model of government and the other one is fragile parliamentary form of government which was initially favored by Constituent Assembly of Pakistan and got support from public representatives that advocated federalism and supremacy of Parliament.<sup>197</sup> After 1947, military seized power in several coups and became predominant over other political actors. Military has ruled the country for over half of its history. Interestingly, military has never possessed enough coercive capacity for regulating control entirely on its own. While utilizing force and coercion for preservation of power, military was always backed by

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<sup>197</sup> 34.95. Siddiqua, Ayesha, *Military Inc.: Inside Pakistan's Military Economy* (London: Pluto Press, 2007), 304p. Ages, paperback, 35.<sup>1</sup> *Asian Security* 5, no. 1 (2009): 73-75.

<sup>197</sup> Jones, Philip Edward. *The Pakistan People's Party: Rise to Power*. (USA: Oxford University Press, 2003): 02-06.

bureaucrats, politicians, and judges so as to expand its authority and lend its reign a license of validity.<sup>198</sup>

Due to these frequent regimes, military has assumed powers in various spheres such as legal, political and institutional transformation in order to preserve and extend its influence during civilian rules. This process maybe referred to as transformative preservation which has been followed by a new established pattern.<sup>199</sup> In order to strengthen its viceregal aspects, the regime brought extensive modification to the governmental structure. Apparently, army has confined its dominance to defense and foreign policy. In reality, military has never kept itself restricted to these areas rather extended its authority to socio-economic and political construction of the government.<sup>200</sup> Resultantly, it helped military reach a dominant position, which was more strengthened with the passage of time. To understand how despotic regimes entrenched authority over civilian government, a categorical investigation to military role in both civilian as well as despotic regimes is required.

Firstly, political process was aggressively manipulated by military and its alliance that consequently undermined weak political parties. Military also got support and motivation from the politicians serving in the opposition. Military achieved these objects by banning political parties and holding election on non-party basis. Moreover, regimes have put restrictions on the associational freedoms and challenged the eligibility criteria of the politicians to hold office. In order to establish its authority, military induces politicians to join their coalition or support their sponsored parties, which perform functions as proxies and are utilized as a potential

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<sup>198</sup> Fair, C. Christine. "Why the Pakistan army is here to stay: prospects for civilian governance." *International Affairs* 87, no. 3 (2011): 571-72.

<sup>199</sup> Kalhan, Anil. "'Gray Zone' Constitutionalism and the Dilemma of Judicial Independence in Pakistan," vol. 46, no. 1 (2013): 15.

<sup>200</sup> Grare, Frédéric. *Reforming the Intelligence Agencies in Pakistan's Transitional Democracy*. (Washington, DC: Carnegie Endowment for International Peace, 2009): 34-46.

scapegoats.<sup>201</sup> With return of civilian rule, military kept on injecting political influence. Military systematically and strategically formalized its governance under the constitutional scheme and thereby manipulated the entire electoral process including media and political parties. Unexpectedly, in the process of military transformation to the civilian rule, politicians and political parties have often facilitated their own exploitation by requesting military's assistance in their short-term controversies.<sup>202</sup>

Secondly, in order to get bureaucratic control, military inducted its personnel in the bureaucratic fabric and thereby effectively colonized the administrative machinery. In the 1980s, during Zia's rule, a substantial number of active and retired personnel were deployed to the civilian positions through designated quota schemes.<sup>203</sup> Similarly, Musharraf's regime witnessed deeper encroachment whereby thousands of officials were placed for serving on monitoring teams so as to oversee civil bureaucracy at every level. This huge deployment of military personnel in the bureaucratic fabric has almost paralyzed the civil administration. Despite the fact that military promised to withdraw many of these officers from the military oriented administration, the civilian government, however, could not easily reverse these infiltrations.<sup>204</sup>

Thirdly, the military and its allied forces have taken hold on national economy. Reportedly, military has an economic empire that is worth billions of dollars. Since partition, military has established connections with the elites.<sup>205</sup> With

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<sup>201</sup> Rolfe, Jim. "The Asia-Pacific: a region in transition." Asia-Pacific Center for Security Studies Honolulu HI, (2004): 130-131.

<sup>202</sup> Fruman, Sheila. *Will the Long March to Democracy in Pakistan Finally Succeed?*, (US Institute of Peace, 2011): 8- 9.

<sup>203</sup> Charles H. Kennedy, *Bureaucracy in Pakistan*, 198, pp. 122-25.

<sup>204</sup> Masood, Salman. "New Pakistan Army Chief Orders Military Out of Civilian Government Agencies, Reversing Musharraf Policy," *New York Times* 13 (2008): 8.

<sup>205</sup> Cohen, Stephen P. *The Idea of Pakistan*. (Brookings Institution Press, 2004): 269-73.

the passage of time, military turned to an elite class and has been claiming a substantial share in the economic resources and privileges. The military has been using various tactics to strengthen their economic position. The welfare foundations were primarily introduced for the benefits of retired military personnel. Now, it employs individuals and commercial ventures across several sectors. These sectors are mostly not subject to any kind of accountability that provides certain individuals an opportunity to get maximum benefits arising from the military connections.

In the economic sphere, favorable access to the land is another means of getting undue benefits. Military being one of the largest landowners, while utilizing its influence, authority, and force, acquired worth billions of real-estate below market price and thereafter allocate and sell those properties to the officials and affiliates on favorable terms. In both rural and urban areas, military gets advantage of the land. In the former case, these schemes are usually meant to strengthen ties with the feudal elite while in the latter case military has turned out to be one of the largest developers in commercial and residential schemes that ultimately enable officers to make huge profits. Besides economic vitality that further improved military's authority and prestige, it has significantly contributed in realizing importance of land and investment in real-estate.<sup>206</sup>

Fourthly, media is another considerable element for establishing long lasting despotic regimes. Military either coerced the journalists or took their confidence to support military activities. Due to violence against the journalists, Pakistan has been ranked one of the most dangerous countries for the journalists. Military influences media by different means such as restrictions on broadcasting or publication, paying off journalists, planting and propagating rumors and stories of their choice.

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<sup>206</sup> Human Rights Watch, Solid Hands: "The Pakistan Army's Repression of the Punjab Farmers," (Movement 6, 2004).

Liberalization of media was another move of the regime for shaping public discourse. The recent liberalization of electronic media has facilitated more public discourse that consequently exposed state institutions for greater criticism. Nonetheless, media was significantly influenced both in military as well as civilian rule. Besides augmentation of military's institutional authority, media enabled to reinforce despotic hegemony even in times of the civilian rule. The political clout of military is not on its own rather it is due to political and financial strength of its affiliates.<sup>207</sup> The United States of America significantly contributed in financial and political spheres for this hegemonic transition. The US assistance to strengthen military at the expense of civilian rule was motivated originally by the Cold War and later on followed by 2001 terrorist attacks.<sup>208</sup> Recently, the US aid constrained civilian support and strengthened military.

Military dominance and its affiliated interests have been validated and continued by an antidemocratic process. This legitimizing discourse encompasses two viewpoints, which the military and its affiliates have disseminated by various means such as publications, textbooks, cultural exhibitions, and media: security and competent institution. Throughout Pakistan's history, security related concerns were emerged a defining contribute of state's identity. Military projected itself as the state guardian and the state of insecurity encouraged it to come forward. Consequently, military claimed itself not only as a symbol of state security but its very existence. Ultimately, distrust was developed in public regarding politicians' ability to discharge these responsibilities in its true spirit. This civilian governance in the state of insecurity motivated and encouraged military's intervention, in order to safeguard the

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<sup>207</sup> Siddiqi, Ayesha. *Military Inc.: inside Pakistan's military economy*. Penguin Random House India, (2017): 62-72.

<sup>208</sup> Rashid, Ahmed. "Descent into Chaos: The US and the disaster in Pakistan." *Afghanistan, and Central Asia*. Barcelona, Ediciones Península (2009): 148-49.

state's identity and ideology that necessitated creation of Pakistan. Military has not only considered and presented itself as Pakistan's most competent institution in the security matters, but also in the governing and development spheres. This self perception of professionalism advocates military of being selfless, well disciplined, obedient, and most competent institution. In contrast, the public representatives are projected to be exceptionally incompetent, extremely corrupt, and dishonest.<sup>209</sup>

Keeping in view the above considerations, military justifies its involvement in routine activities, which is beyond its constitutional mandate; protection of the state against external aggression and assistance to the civil authority when called upon by the state representatives. Nevertheless, military frequently contented and associated its economic activities with Pakistan's development. In spite of the fact, military governed enterprises are evidently mismanaged and resulted to be inefficient. However, the military owned enterprises are considered viable because of hidden subsidies. The military regimes used another tactics to establish their good will in society and engaging itself in high profiled efforts, in order to combat corruption. Despite the fact that the military is often considered outside the realm of corruption. For securing its own interest, the regime also imposes extra-constitutional obligations on the parliamentarians. In 2002, Musharraf imposed condition of university degree to hold the legislative office.<sup>210</sup> Over the time, regime and its affiliates progressed and emerged, which consequently eclipsed its transition to the civilian rule and constitutionalism.

The far-reaching accumulation of military's authority has brought twofold impacts: strengthening military as an institution and undermining the representative institutions in order to preserve that authority. The affiliates ensured that other

<sup>209</sup> Kalhan, Anil. "Gray Zone' Constitutionalism and the Dilemma of Judicial Independence in Pakistan," vol. 46, no. 1 (2013): 21.

<sup>210</sup> Ibid. pp. 21-22.

institutions such as courts impartially share military's interest without any formal coordination, collaboration, or use of intimidation. This shared interest of the military and its affiliates were reinforced by legitimating discourse, justifying military's supremacy and the same was utilized for undermining and delegitimizing civilian rule. Even, if arrangements are made to restrict military's active political role, that move would be fleeting and at the same time military's involvement would be increased in the civilian government because military's influence is deep rooted in our bureaucratic fabric. A successful democratic consolidation requires strong indigenous movement which is backed by international forces. In order to secure its transition from the gray zone, good governance capacities, stronger representative institutions, and authority to rule these entrenched regimes is inevitable.

### **3.2.2. Transformative Preservation**

Throughout legal and political history of Pakistan, judiciary played a very competing role than its legitimate expectations. There were some unavoidable challenges and potential threats to judicial autonomy from military and its affiliated interests. Lack of judicial autonomy forced judiciary to support military regimes at the expense of the civilian rule. Judiciary legitimated authoritarianism and supported the colonial viceregal form of government. Consequently, military was enabled to enjoy legal control over domestic politics. In the process of transformative preservation, judiciary backed despotic regimes in two ways: firstly, when military took direct charge of the political system and replaced its authority with that of the civilian government. Judiciary, on the pretext of extraconstitutional grounds of state necessity, validated military's interventions. Judiciary provided a legal shield to the extraconstitutional encroachments of military. In the process of transformative

preservation, the judiciary supplemented a legal dimension to military discourse. Secondly, judiciary has not restricted its support to the regime rather it extended its support to military's extraconstitutional discourse against the civilian governments. Under the constitutional auspices, judiciary has strengthened an antidemocratic legalizing discourse by validating the regime. Resultantly, judiciary is deeply trapped in mega politics by validating change in the government in both constitutional and extraconstitutional aspects.<sup>211</sup>

### 3.2.2.1. Military Regimes – Extraconstitutional Necessity

After direct seizure of power, military engaged itself in a systematic and multi-staged process of constitutional transformation. In both legitimating and reinforcing its dominance, military was backed by judiciary.<sup>212</sup> Firstly, military successfully established threats to the state's very existence. These existential threats justified replacement of the Constitution with a parallel legal framework, which is generally termed as Provisional Constitutional Order (PCO). That was a legal tool for strengthening and promoting colonial viceregal governance. *Anil Kalhan* termed this parallel order as an extraconstitution. This parallel order displaced the constitution at the expense of the civilian rule and simultaneously sought its validity by imitating and exposing on the face of its compliance to the regular and institutional form.<sup>213</sup> In order to validate the regime, military often required judiciary to be constrained and

<sup>211</sup> Hirsch, Ran. "The judicialization of mega-politics and the rise of political courts." *ANNU. REV. POLIT. SCI.* 11 (2008): 93-113; Hirsch, Ran. "The new constitutionalism and the judicialization of pure politics worldwide." *Fordham L. Rev.* 75 (2006): 721- 723; Khan, Maryam. "The politics of public interest litigation in Pakistan in the 1990s." *SOC. SCI. & POL'Y BULL.* 2 (2011): 2.

<sup>212</sup> Waseem, Mohammed. "Constitutionalism in Pakistan: The changing patterns of dyarchy." *Diogenes* 53, no. 4 (2006): 102-09.

<sup>213</sup> Kalhan, Anil. "'Gray Zone' Constitutionalism and the Dilemma of Judicial Independence in Pakistan." Vol. 46, no. 1 (2013): 25.

reconstituted. Typically, judges were bound to take new oath of their office undertaking compliance to the extraconstitution so as to retain their positions.

Secondly, military relied on the validity of the regimes, by the re-constituted judiciary, under the necessity doctrine. In Pakistan, this doctrine was first invoked in the 1950s, which created a controversy to the form of government between the Constituent Assembly and the Governor General. The former, advocated parliamentary supremacy and federalism. The latter, contrary to the former's vision, supported presidential form of government and pushed Pakistan towards viceregal governance. While invoking the viceregal form of government, the Governor General proclaimed emergency and declared that constitutional machinery of the state had broken down and had failed to be carried into effect. The assembly was dissolved prior to the ratification of the proposed Constitution.<sup>214</sup> This extraconstitutional act was further strengthened by succeeding judicial and executive responses by facilitating a legal and constitutional discourse. Later on, the Court legitimized the Governor's extralegal actions and thereby validated previously invalidated laws. In order to prevent the state from dissolution, the Court validated extraconstitutional act on the pretext of state necessity.<sup>215</sup>

The Supreme Court of Pakistan, through several military interventions, has developed a considerable amount of extraconstitutional jurisprudence elucidating the doctrine of state necessity, which had proven extremely enduring.<sup>216</sup> In Pakistan, this doctrine got legal recognition in a self-justifying manner, which was referred to by Johan Steyn followed by David Dyzenhaus as a "legal black hole", which is elaborated to be a zone where the authorities can work unrestricted by the

<sup>214</sup> Tamezuddin Khan v. Federation of Pakistan, 240 PLD , 251 (FC 1955).

<sup>215</sup> Governor-General's Reference, PLD 478 (FC 1995).

<sup>216</sup> State v. Dossa, 533 PLD, 538-39 (SC 1958); Nusrat Bhutto v. Chief of Army Staff, 657 PLD, 733-63 (SC 1977); Zafar Ali Shah v. Musharref, 869 PLD 881 (SC 2000).

Constitution that proclaims their potential acts legal on the touchstone of necessity and good faith.<sup>217</sup>

The doctrine of state necessity and its associated principles invoked by the Supreme Court, significantly contributed legitimization of extraconstitutional discourse, which was further used by military to delegitimize the civilian government in favor of its own dominance. There are many instances where the judiciary validated the regimes' interventions such as the court while validating Zia's 1977 takeover accredited military for saving the country against a great national crisis.<sup>218</sup> The Court relied on Zia's speech and declared that on the basis of suspected electoral embezzlement, the government has lost its constitutional and moral authority.<sup>219</sup>

This discourse was more rigorously enforced by the Supreme Court while validating Musharraf's takeover of 1999. The Court approved military's claims of corruption, lack of good governance, and insufficient macroeconomic commitments that necessitated military intervention.<sup>220</sup> Likewise, Court validated extraconstitutional order that required the parliamentarians to hold university's degrees. The Court further concluded that the order regarding the parliamentarians' qualification needs approval as its underlying objective is to change the political culture and advance politicians' competence level.<sup>221</sup> Both regimes were authorized, within their legitimate scope of authority, to make any arrangements including constitutional amendments, in order to advance welfare of the people. In each instance, judiciary invested good faith in military so as to offer Pakistan with more

<sup>217</sup> Steyn, Johan. "Guantanamo Bay: The Legal Black Hole." *International & Comparative Law Quarterly* 53, no. 1 (2004): 1; Dyzenhaus, David. "Schmitt v. Dicey: Are states of emergency inside or outside the legal order." *Cardozo L. Rev.* 27 (2005): 32.

<sup>218</sup> *Nusrat Bhutto v. Chief of Army Staff*, PLD 723 (1977 SC).

<sup>219</sup> Newberg, Paula R. *Judging the state: courts and constitutional politics in Pakistan*. Vol. 59. (Cambridge University Press, 2002): 1663-64.

<sup>220</sup> *Zafar Ali Shah v. Musharraf*, PLD 1129-52 (SC 2000).

<sup>221</sup> *Pakistan Muslim League (Q) v. Chief Executive*, 54 PLD 994, 1026-28 (SC 2002).

durable and capable governing authority.<sup>222</sup> Despite the fact, the court validated the regimes through necessity doctrine, but in each case, it circumscribed militaries' circle of authority and in each case military overlooked those limits.<sup>223</sup>

Thirdly, after experiencing these regimes, the constitution is ultimately revived. Two parallel governments consequently created a dilemma where both constitution and extraconstitution, whose very existence amounts to treason, contended for sovereignty. It is high time for Parliament to finalize whether the constitution, extraconstitution or blend of both will reign supreme. Parliament while responding to Zia and Musharraf regimes, incorporated extraconstitutional provisions, through constitutional amendments, which remained valid even after restoration of the representative government. Nonetheless, in each despotic regime, Parliament that granted consent was short of essential democratic credentials due to irregularities in election process and other kinds of interventions from military and its affiliates.<sup>224</sup>

### 3.2.2.2. Constitutionalized Necessity

Military, by utilizing its extraconstitutional measures, gradually transformed Pakistan's constitutional order, reinforced viceregal form of government, in order to stretch its authority up to the representative government. For instance, in Zia's regime, eighth amendment to the Constitution was introduced whereby the executive authority of the state was shifted to the president at the expense of the Prime Minister and Parliament.<sup>225</sup> Military preserved its authority through these transformations

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<sup>222</sup> Zafar Ali Shah v. Musharraf, PLD 1220 (SC 2000); Nusrat Bhutto v. Chief of Army Staff, PLD 716 (SC 1977).

<sup>223</sup> Zafar Ali Shah v. Musharraf, PLD 1219-23 (SC 2000); Nusrat Bhutto v. Chief of Army Staff, PLD 723 (SC 1977).

<sup>224</sup> Khan, Hamid. *Constitutional and political history of Pakistan*. 2<sup>nd</sup> ed. (Oxford University Press, USA, 2009): 509-17.

<sup>225</sup> Wasseem, Mohammad. "Pakistan's lingering crisis of dyarchy." *Asian Survey* 32, no. 7 (1992): 617, 620-22.

notwithstanding the ostensible return of democratic government. In fact, Zia, who assumed both offices of Presidency and Army Chief, transformed the constitutional order because there was no opponent of the previous regime rather its extension.<sup>226</sup>

Within this system of political rule, Article 58(2) (b) was the most consequential provision conferring broad powers to the president for dissolution of the assembly, where the state cannot be governed according to the constitutional mandate.<sup>227</sup> This Article was used as a powerful tool against the governments as evident between 1988 and 1996 where four civilian governments were dismissed.<sup>228</sup> The proponents of this provision justify it as a safety value for the accountability of the civilian government and to avoid potential crisis, which may lead to military's intervention.<sup>229</sup>

In 2000, the Court straightly associated and justified Musharraf's takeover, under the necessity doctrine, to Article 58(2) (b), which was already repealed in 1997. The Court declared, had the provision intact, Musharraf's intervention could have been avoided and the civilian government could have been constitutionally dissolved.<sup>230</sup> The Court elaborated how this provision was rearticulated: a legal instrument to dismiss government as compared to that of military's extraconstitutional dismissal.<sup>231</sup> Logically speaking, Article 58(2) (b) is relatively more destabilizing than that of extraconstitutional intrusions. Keeping in view destabilizing character of Article 58(2) (b), military had utilized this provision as an extra means in order to

<sup>226</sup> Rizvi, Hasan-Askari. "The civilianization of military rule in Pakistan." *Asian Survey* 26, no. 10 (1986): 1067.

<sup>227</sup> Article 58(2) (b) of the Constitution of Pakistan, 1973 (repealed 2010 via 18<sup>th</sup> Amendment to the Constitution).

<sup>228</sup> Siddique, Osama. "The Jurisprudence of dissolutions: presidential power to dissolve assemblies under the Pakistani Constitution and its discontents." *Ayiz. J. Int'l & Comp. L.* 23 (2005): 634.

<sup>229</sup> Kennedy, Charles H. "Constitutional and Political Change in Pakistan: The Military-Governance Paradigm." *Prospects for Peace in South Asia* (2005): 73-74.

<sup>230</sup> Zafar Ali Shah v. Musharraf. 869 PLD 1218 (SC 2000); Mahood Khan Achakzai v. Federation of Pakistan, 426 PLD 472-80 (SC 1997).

<sup>231</sup> Siddiqua, Ayesha. *Military Inc.: Inside Pakistan's military economy*. (Penguin Random House India, 2017): 89.

manipulate the politicians.<sup>232</sup> This consistent threat of dissolution had adversely affected parties' conduct. The opposition parties also looking for military's support in order to dismiss their adversaries' government with hope to ascend power themselves through early elections.<sup>233</sup>

Military was effectively succeeded to divide and rule the political leadership and no government was allowed to govern for a complete term.<sup>234</sup> The dissolution orders of all four governments were challenged before the SC. The Court, however, validated the displacement of the representative government. This provision had not completely avoided restrictions on the executive to allow the government to do according to its will.<sup>235</sup> Hypothetically speaking, the Court while exercising its authority of review could have imposed essential restrictions on the dissolution of the government. On contrast, the Indian Supreme Court in *S.R. Bommai v. India*<sup>236</sup> effectively restrained central governmental authority to dissolve state's assemblies. The Court compelled the authority to provide considerable constitutional reasons for dissolution of states' assemblies.<sup>237</sup> While Article 58(2) (b) reflected two unpredictable standards for dissolution of assemblies: lack of security and good governance.<sup>238</sup>

The Court while considering dissolution orders, apply different standards: validated dissolution order in both Benazir Bhutto's governments while in earlier cases, the Court had invalidated the same. The Court modified its legal standard and

<sup>232</sup> Siddique, Osama. "The Jurisprudence of dissolutions: presidential power to dissolve assemblies under the Pakistani Constitution and its discontents." *Ariz. J. Int'l & Comp. L.* 23 (2005): 633.

<sup>233</sup> Siddiqua, Ayesha. *Military Inc.: inside Pakistan's military economy*. (Penguin Random House India. 2017): 91-95.

<sup>234</sup> Siddique, Osama. "The Jurisprudence of dissolutions: presidential power to dissolve assemblies under the Pakistani Constitution and its discontents." *Ariz. J. Int'l & Comp. L.* 23 (2005): 711.

<sup>235</sup> Dyzenhaus, David. "Schmitt v. Dicoy: Are states of emergency inside or outside the legal order." *Cardozo L. Rev.* 27 (2005): 2018.

<sup>236</sup> *S.R. Bommai v. India*, AIR 1918 (SC 1994).

<sup>237</sup> Sathe, S. P. "Judicial Activism in India: Transgressing Borders and Enforcing Limits (2003): 150-59.

<sup>238</sup> *Federation of Pakistan v. Muhammad Saifullah Khan*, 41 PLD 166, 188 (SC 1989).

reviewed dissolution orders more differently.<sup>239</sup> Unlike the PPP's government, both cases which involved the invalidation of dissolution order, the political parties and the Prime Ministers were strongly associated with Zia and its affiliates. In the first instance, the Court declined the Army Chief's stance regarding non-restoration of the ousted government for illegal dissolution of Junejo's government.<sup>240</sup> In the subsequent case, where the Court reinstated Sharif's government, military pushed both the Prime Minister and the President to resignation, which rendered decision of the Court insignificant.<sup>241</sup>

In the PPP's governments, the Court while upholding dissolution orders reiterated its traditional role of validating the extraconstitutional acts. Like the jurisprudence evolved through doctrine of state necessity, the Court reinforced military's legitimating discourse. Even though, corruption charges and mismanagement justified each dissolution order, both dismissal orders witnessed potential threat to military's interests.<sup>242</sup> Like necessity's doctrine, the court rendered both allegations of corruption and mismanagement legitimate basis for dismissal of the civilian rule.<sup>243</sup> Nevertheless, the Court invalidated the dissolution of civilian rules, led by parties deeply associated with military and its affiliates. The Court failed to apply the same standards while reviewing Bhutto's government. The Court expanded its own ambit of authority as an institutional-broker through its own perceived impartiality while dealing with military and its allies.<sup>244</sup>

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<sup>239</sup> Ahmad Tariq Rahim v. Federation of Pakistan, 44 PLD 646, 664 (SC 1992).

<sup>240</sup> Federation of Pakistan v. Saifullah Khan, PLD 192-95 (SC 1989).

<sup>241</sup> Nawaz Sharif v. President of Pakistan, PLD 570 (SC 1993).

<sup>242</sup> Rolfe, Jim. *The Asia-Pacific: a region in transition*. Asia-Pacific Center for Security Studies Honolulu HI, (2004): 213.

<sup>243</sup> Ahmad Tariq Rahim v. Federation of Pakistan, 653 PLD 666-67(SC 1992); Benazir Bhutto v. President of Pakistan, PLD 434-38(SC 1998).

<sup>244</sup> Oberst, Robert C., Yogendra K. Malik, Charles Kennedy, Ashok Kapur, Mahendra Lawoti, Syedur Rahman, and Ahrar Ahmad. *Government and politics in South Asia*. Hachette UK, (2013): 167.

### 3.2.3. Impact of Transformative Preservation on Judicial Autonomy and Constitutionalism

Military's transformative preservation has adversely affected state institutions where judiciary stands with no exceptions, leaving far-reaching impacts on judicial organ. Its institutional identity, role, and impartiality have been shaped by various contributing factors. These factors ultimately have given birth to a state of disequilibrium among state organs. Resultantly, consolidation of democracy, civilian rule and constitutionalism has been adversely affected. It is reported that Pakistan's judiciary lacked real autonomy in terms independence and integrity.<sup>245</sup> Judicial autonomy is not an absolute or constant end in itself rather it is the outcome of its association and dependence on other state organs. Judiciary is meant to serve other normative objectives such as democracy, constitutionalism, supremacy of law, fundamental rights.<sup>246</sup> The significance of these words varies with different contexts. Countries like Pakistan, situated in gray zone, with strong representative institutions having advanced judicial accountability mechanism are better than the ones where there is isolated judicial autonomy.<sup>247</sup>

For understanding the underlying objective of judicial autonomy, in both descriptive as well as normative terms, a balance between judicial autonomy and judicial constraints is indispensable. Nonetheless, there are many relationships which could potentially create hindrances to judiciary's independence such as bar association, lawyers, media, public at large, and military.<sup>248</sup> The proposed balance

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<sup>245</sup> Mullally, Sitibhan. "A Long March to Justice: A Report on Judicial Independence and Integrity in Pakistan." (2009): 758.

<sup>246</sup> Ferejohn, John A., and Larry D. Kramer. "Independent judges, dependent judiciary: Institutionalizing judicial restraint." *NYuL REv.* 77 (2002): 994-95; Burbank, Stephen B., and Barry Friedman. *Judicial independence at the crossroads: an interdisciplinary approach*. (Sage, 2002): 11-22.

<sup>247</sup> Ely, John Hart. *Democracy and distrust: A theory of judicial review*. (Harvard University Press, 1980): 101-02.

<sup>248</sup> Remus, Dana. "Just Conduct: Regulating Bench-Bar Relationships." (2011): 144-45; Baxi,

between judicial autonomy and its constraints maybe influenced by various considerations: judicial administration, its institutional composition, process of judges' appointment and removal, judges' conduct regulation, and response to judicial decisions. Moreover, there are some other contributing factors which leave impacts on the balance between constraints and autonomy such as laws, institutions, and norms including the scope of judicial power. This balance may also be affected by co-relationship among non judicial actors.<sup>249</sup> Judicial autonomy, being a multidimensional concept, obscures some traditional notions. This basic discussion is of very high significance, particularly for rationalizing the role of judiciary in gray zone countries.

Keeping in view the assumption of status quo interests which undermines the spirit of constitutionalism, the state organs must ensure their autonomy from entrenched military in both civilian rule and military rule. Within the prevailing disaggregated conception of transformative preservation of military and its affiliates, it is very difficult to determine overall balance between judicial autonomy and its constraints.<sup>250</sup> By closely considering these conceptions, an image of imbalance may arise among military, Parliament and judiciary. Evidently, judiciary has to face far-reaching constraints from military and its affiliates. Nonetheless, judiciary has been periodically empowered and motivated itself, in order to assert its autonomy from the representative institutions. During its direct rule, military ensured judiciary's adherence to their extraconstitutional acts by various means such as manipulating and

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<sup>249</sup> Upendra. *Courage, craft, and contention: the Indian Supreme Court in the eighties*. NM Tripathi, (1985): 27-36.

<sup>250</sup> Russell, Peter H., and David M. O'Brien, eds. *Judicial Independence in the age of democracy: critical perspectives from around the world*. (University of Virginia Press, 2001): 13-22; Tobaria, Jose J. "Judicial independence in an authoritarian regime: the case of contemporary Spain." *Law & Society Review* 9, no. 3 (1975): 473, 486-95; Shankar, Shylashri. "Scaling Justice: India's Supreme Court, Social Rights, and Civil Liberties." *OUP Catalogue* (2009): 177.

<sup>251</sup> Kalhan, Anil. "Gray Zone' Constitutionalism and the Dilemma of Judicial Independence in Pakistan." vol. 46, no. 1 (2013): 37.

reshaping judicial composition, taking oath under the PCO, or by circumscribing its jurisdictional sphere. Military's capacity to constraint judiciary in its direct reign is not astonishing. Judiciary remained vulnerable to military's influence even after the restoration of democracy and absence of its direct control or collaboration.

There could be various considerations that led judicial adherence to military: the judges who hold office during the regimes, whose loyalty to the military's interest has already been guaranteed, have remained in office even after restoration of the representative government.<sup>251</sup> The chief justices of the superior courts hold authoritative position in matters of judicial appointments, administration, and case assignments. These chief justices are influenced by the executive, which is controlled by military.<sup>252</sup>

Like politicians, judiciary faces the same threat of military intrusion, which has evidently reflected in the decision making. However, military's constraints and judiciary's vulnerability to such constraints has never been absolute, rather diminished over the time. The judges, in their individual as well as institutional capacity, have consistently asserted some measures of autonomy from military. Over the time, the scope of validation to military's extraconstitutional acts has been narrow down. For instance, in *State v. Desso*<sup>253</sup>, the Supreme Court without imposing any restrictions on regime's law-making authority declared that a successful revolution is a basic law creating factor. While in *Nusrat Bhutto v. Chief of Army Staff*<sup>254</sup>, the Court validated Zia's interventions under the doctrine necessity, but required the regime to take measures appropriate to the necessity. The Court further declared that

<sup>251</sup> Dyzenhaus, David. "Judicial independence, transitional justice and the rule of law." *Otago L. Rev.* 10 (2001): 345, 347.

<sup>252</sup> Khan, Maryam. "The politics of public interest litigation in Pakistan in the 1990s." *SOC. SCI. & POL. Y.BULL.* 2 (2011): 14-17.

<sup>253</sup> *State v. Desso*, 10 PLD (SC 1958); 533, 539-41.

<sup>254</sup> *Nusrat Bhutto v. Chief of Army Staff*, 29 PLD (SC 1977); 657, 710.

the proposed arrangements should be temporary in nature, circumscribed to the duration of exceptional situations. The Supreme Court in *Zafar Ali Shah v. Musharraf*<sup>255</sup> further narrowed down the scope of regime's authority by imposing time limit. The Court validated Musharraf's takeover and required elections within three years.

Till the recent past, the most significant judicial autonomy sought from military is either in the two ways: when the regime had lost its authority or when appeared to be out of authority soon.<sup>256</sup> Keeping in view the magnitude of military's power, even the strongest assertion of judicial independence has never been witnessed to resist the regime. Military is capable of imposing constraints on judiciary through extraconstitutional actions, as evident from both Zia and Musharraf's regimes.<sup>257</sup>

In contrast, judiciary significantly exhibited autonomy from the representative institutions. This autonomy is not only witnessed during military regimes, where the very purpose of military was to validate their extraconstitutional act and to displace the civilian government, but even under the civilian rule as evident between 1988 and 1999.<sup>258</sup> For instance, judiciary acquired control over the process of judicial appointments after confrontation with both the government of the PPP and the PML (N).

Under the Constitution of 1973, the President had the authority to appoint judges to the superior courts in consultation with the concerned Chief Justice.<sup>259</sup> The Bhutto's government sought to compose the courts which maybe loyal to them and

<sup>255</sup> *Zafar Ali Shah v. Musharraf*, 52 PLD (SC 2000): 869, 1219-23

<sup>256</sup> *Asma Jilani v. Punjab*, 24 PLD 139 (SC 1972); *Federation of Pakistan v. Muhammad Saifullah Khan*, 41 PLD 166 (1989 SC); *Benazir Bhutto v. Federation of Pakistan*, 40 PLD 416 (SC 1988).

<sup>257</sup> Gazzar, Haris, "Judicial activism vs democratic consolidation in Pakistan." *Economic and Political Weekly* 44, no. 32 (2009): 10.

<sup>258</sup> Malik, Muneer A. "The Pakistan Lawyer's Movement." *An unfinished agenda. Karzai: Pakistan Law House* (2008): 75-142.

<sup>259</sup> Article 177, 193 (amended 2010) of the Constitution of Pakistan, 1973.

may safeguard their party's interest. The PPP's government appointed judges, without considering basic rules regarding qualification, and further manipulated judicial composition by *ad hoc* appointments and inter-court transfers.<sup>260</sup> The PML (N)'s government was proved to be more aggressively confronted the Supreme Court on judicial appointments and other issues. The government while making efforts to remove the Chief Justice attacked the Court's premises.<sup>261</sup> In terms of judicial composition, judiciary had barely resisted military's manipulation as military was relatively more powerful than it was in the democratic governments.

In *Ab-Jehad Trust v. Federation of Pakistan*<sup>262</sup>, also known as judges' case, the Court rejected appointments made by the PPP and formulated comprehensive rules for the appointment procedure.<sup>263</sup> Influenced by the jurisprudence developed in India, the Court held that the president is bound by the recommendations of the Chief Justices for the appointment of judges to the superior courts, except on presence of sound reasons, which shall be recorded by the President. The Court further elaborated that senior most judge of the high court shall be appointed the chief justice of the respective high court. This seniority criterion was later on extended to the chief justice of the Supreme Court.<sup>264</sup> Nonetheless, after few years, the PML (N) government opposed the Chief Justice's nomination provided under the judges' case.<sup>265</sup>

The above mentioned instances are examples of political backing and kleptocracy, having institutional aspects. Empowering judiciary will be a determining factor in government's fate and parliaments' weakness in relation to the president and

<sup>260</sup> Hamid Khan. *Constitutional and political history of Pakistan*. ed. 2<sup>nd</sup> (Oxford University Press, USA, 2009); 594-96.

<sup>261</sup> Ibid. 622-629

<sup>262</sup> PLD 324 (SC 1996)

<sup>263</sup> *Al-Jehad Trust v. Federation of Pakistan*, 48 PLD 363-367 (SC 1996).

<sup>264</sup> *Asad Ali v. Federation of Pakistan*, 50 PLD 161, 354-55 (SC 1998).

<sup>265</sup> Hamid Khan. *Constitutional and political history of Pakistan*. ed. 2<sup>nd</sup> (Oxford University Press, USA, 2009); 623-25.

military.<sup>266</sup> The civilian governments as well as military regimes have strived to manipulate judicial appointment according their own advantage. For instance, Bhutto's government promoted *Sajad Ali Shah* as the Chief Justice and superseded other senior justices. This supersession was considered to be the outcome of his dissenting views in the cases involved Article 58(2) (b), which was favorable to the government.

Likewise, the PML (N)'s government opposed the recommended nominees on the assumption that the proposed justices could be hostile to their government.<sup>267</sup> It is noteworthy that when both the governments resisted compliance to the Court's directions on judicial appointments, the President as well as military stood with judiciary. In fact, Article 58 (2) (b) order, whereby the PPP's government was dismissed, articulated that the government's resistance to implement judges' case was an effort to obliterate judicial autonomy.<sup>268</sup> Musharraf's intervention of 1999 ousted Sharif's second government. Likewise, the reconstituted Court legitimized the regime on the pretext of necessity doctrine and explicitly referred to the confrontation between the PML (N) and judiciary.

Considering the imbalanced institutions, judicial efforts towards its autonomy from the representative institutions were unequal. The incorporation of two amendments in 1997, one of which repealed Article 58(2) (b), further intensified confrontation among military, Parliament, and judiciary. The Supreme Court presented constitutional challenges to these amendments and directed their enforcement. The MPL (N) raised an anti-court campaign, which led to the contempt proceedings against the Prime Minister, Nawaz Sharif. His political allies attacked the

<sup>266</sup> Hirsch, Ran. "The judicialization of mega-politics and the rise of political courts." *Annu. Rev. Polit. Sci.* 11 (2008): 749.

<sup>267</sup> Hamid Khan. *Constitutional and political history of Pakistan*. ed. 2<sup>nd</sup> (Oxford University Press, USA, 2009): 595,623.

<sup>268</sup> Ibid. p.595; *Zafar Ali Shah v. Musharraf*, 869 PLD 1218-19 (SC 2000).

Court's building, where the military came forward for the arbitration and reinforced itself at the expense of both institutions.<sup>269</sup> For these reasons, neither judiciary nor politicians effectively resisted for two years after Musharraf's takeover.<sup>270</sup>

### **3.3. SEPARATION OF POWERS AND SYSTEM OF CHECKS AND BALANCES**

Separation of powers is a model of democratic system whereby the political powers are distributed among three governmental branches: the legislature, the executive, and the judiciary. Each branch exercises its sovereign authority within its constitutionally designated sphere, subject to a reasonable check from the other state organs, in order to avoid excessive use of authority and its undue intervention in the other state organs. The American democratic system got its foundation on the doctrine of separation of powers and checks and balances, which is globally followed by the other democracies. This concept reflects its roots in *the Spirit of Laws* by Montesquieu.<sup>271</sup>

In federal democracies, the system of checks and balances implies inevitability of three competing sovereigns. "Check" refers to the capability, right, and duty of each organ to administer the others organ's activities. Similarly, "balance" refers to each organ's capacity to regulate its authority so as to curtail the excessive authority of the others.<sup>272</sup> Keeping in view the vitality of the doctrine in the democratic arena, its inevitability in the concept of constitutionalism, and effects of this doctrine in the

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<sup>269</sup> Asad Ali v. Federation of Pakistan, 50 PLD 161, 354-55 (SC 1998).

<sup>270</sup> Kalhan, Anil. "'Gray Zone' Constitutionalism and the Dilemma of Judicial Independence in Pakistan." vol. 46, no. 1 (2013): 42.

<sup>271</sup> The *Spirit of Laws* are treatise on political theory as well as a pioneering work in comparative law, published in 1748 by Charles de Secondat, Baron de Montesquieu, French political and social philosopher.

<sup>272</sup> Sultana, Tasneem. "Montesquieu's doctrine of separation of powers: A case study of Pakistan." *Journal of European Studies*28, no. 2 (2012):55.

constitutional development of Pakistan, a thorough investigation into the historical, conceptual, and philosophical nature of the doctrine of separation of powers and system of checks and balances is unavoidable. No doubt, Montesquieu's *Spirit of Laws* played a key role in shaping thinking of the members of the United States' Constitutional Convention.

In France, a little book, *Persian Letters*, was published anonymously in 1721. This book addressed socio-political and literary issues in an exceptional way that people became interested in discovering the author. Later on, it was found that the author was an aristocrat named Montesquieu who was a Chief Justice at Bordeaux.<sup>273</sup> This book significantly attracted Montesquieu's literary capacities and consequently resigned from his public office and switched to a career of letters.

Montesquieu's fame is principally based on his publication, the *Spirit of Laws*, wherein he set-forth separation of powers' doctrine. Nevertheless, this doctrine was not originated by Montesquieu, rather ancient Athens, Plato, and Aristotle realized the security to individual's freedom founded in government, which abstained concentration of power in one body. This concept was primarily originated in the ancient Greece and became widespread in the Roman Republic as part of the Roman Constitution. Aristotle (384 – 322 BC) in his book, '*The Politics*', stated about three elements in each constitution: the deliberative, the official, and the judiciary. In England, this concept was emerged with the appearance of Parliament, the Council of the king, and the court. A French enlightenment political philosopher, Baron Montesquieu, who lived in England from 1729 to 1731 promoted the concept of '*Montesquieu Tripartite System*'. A Greek historian, *Polybius*, highlighted inescapable tendency towards decay manifested in governments that bestows all their

<sup>273</sup> Rossman, George. "The Spirit of Laws: The Doctrine of Separation of Powers." *American Bar Association Journal* (1949): 93.

authority upon the single element of the populous. In the venture of the Roman government, all the elements, the counsels being the monarchial, the senate being the aristocratic, and the democratic elements being the popular assemblies, played their due role; each could check other in order to prevent improper exercise of authority.<sup>214</sup>

Montesquieu was looking for principles of constitutional law, applicable to all forms of governments, which prevent decay and preserves people's liberty. This pursuit led him travelled extensively through Europe and tarried for three years at England where he closely studied the English Constitution. In England, he realized to have found the government's principles. One of the most valuable attributes of his book was the description of separation of powers by making analogy with the Constitution of England. In *Spirit of Laws*, he referred to English form of government: laws were made by Parliament, enforced by the Crown, more likely by the Crown's ministers, and interpreted as well as applied by the courts.

*The Spirit of Law*, published thirty nine years before the US Constitutional Convention of Philadelphia, was the most frequently quoted book with the highest authority. Among Constitution's framers, Hamilton and Madison along with John Jay, who was the first Chief Justice of the USA, contributed a number of newspaper articles, which later on printed together as the "*Federalist*", quoted from Montesquieu's book. The Constitution's founding fathers unanimously convinced that the government would never turn against citizens' right where the government's functions were distributed into legislative, executive, and judicial parts. This doctrine was more than a theory and was regarded as one of the heritages of revolutionary forefathers, which is considered to be the first of the great underlying principles of the

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<sup>214</sup> *ibid.* p. 94.

US Constitution.<sup>275</sup> Keeping in view the potential threat of tyranny and corruption, the framers of the US Constitution constrained the exercise of newly expanded federal authority. Introduction of checks and balances was one of the principal methods of constraint, which helped legitimize and rationalize sovereign authority. Moreover, the framers were considered cautious revolutionaries for elaborating the concentration of powers being the very definition of tyranny<sup>276</sup>, hence, divided the authority among the legislature, the executive, and the judiciary.<sup>277</sup>

According to James Madison, the immense security against the potential threat, in the shape of gradual concentration of authority, lies in delegation of authority and constitutional means, in order to resist undue intrusion of the others.<sup>278</sup> So, to make sure that no branch on its own could dominate the other.<sup>279</sup> The framers went beyond the simple division of state power into three groups, made each group answerable and subject to temporal demands.<sup>280</sup> Owing to competing characteristics and accountability, the branches were susceptible to conflicts rising that could turn to institutional rivalries and could impede the consolidation of federal power for potentially tyrannical ends.<sup>281</sup>

### **3.3.1. Separation of Powers and the Madisonian Model**

Madison's primary objective in advocating the doctrine of separation of powers was aimed to discourage governmental tyranny, coupled with arbitrary and

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<sup>275</sup> *Ibid.* pp. 94-95.

<sup>276</sup> *The Federalist No. 47*, at 301 (James Madison)

<sup>277</sup> *Morrison v. Olson*, 487, U.S. 654, 697-98 (1988)

<sup>278</sup> *The Federalist No. 51*, at 321-22 (James Madison)

<sup>279</sup> Strauss, Peter L., "The place of agencies in government: Separation of powers and the fourth branch." *Columbia Law Review* 84, no. 3 (1984): 573, 577; Greene, Abner S. "Checks and balances in an era of presidential lawmaking." *The University of Chicago Law Review* 61, no. 1 (1994): 123, 142-53.

<sup>280</sup> *The Federalist No. 51*, at 321-22 (James Madison)

<sup>281</sup> Cutler, Lloyd N. "Some reflections about divided government." *Presidential Studies Quarterly* 18, no. 3 (1988): 485, 486.

capricious rule, which is the outcome of government of men, not of laws. The separation of powers is considered to be the central democratic character of the US Constitution. Madison wished to establish a mechanism of checks and balances and referred to the tyranny where the concentration of all governmental powers is in the same hands, whether self-appointed, inherited, or elective maybe regarded as the basic definition of tyranny.<sup>282</sup> Both accumulation of powers and tyranny were considered interlinked and inseparable.<sup>283</sup>

The framers retained Montesquieu's teachings about principles of separation of branches in the US Constitution. They, however, discarded the notion of branches' representation of the major social class such as the aristocratic, the democratic, and the monarchial. Likewise, the primary objective linked with the concept of division of powers was the prevention of governmental tyranny. Conversely, tyranny refers to distorted form of monarchy coupled with arbitrary and capricious rule, wherein powers were accumulated in one body.

For instance, the government enjoys absolute authority where the legislative, the executive and, the judicial powers are united, irrespective of the fact whether these powers are vested in one hand or with a large number. In such situations, the legislator, the accuser, the judge, and the executioner will be the same party. There would be hardly probability of an accused' acquittal where a judge himself will be a party to the case. Similarly, any union of the two branches provides the same effects: if both legislative and judicial authorities are united, the outcome will be uncertain laws, which would be reflected on the prejudice of the judge. Where the judiciary joins with the executive, the judge might behave with violence and oppressive. Likewise, the collation of executive and legislative powers would create obstacles for

<sup>282</sup> Eidelberg, Paul. *The Philosophy of the American Constitution*. (1968):153.

<sup>283</sup> Blondel, Jean, and M. J. C. Vile. "Constitutionalism and the Separation of Powers." (1967): 148-51.

the protection and security of the subjects. There would be no liberty to the people because the laws would be enacted and executed tyrannically.<sup>284</sup>

The avoidance of capricious and arbitrary government was the primary objective sought through the separation of powers, where no branch shall exercise another's functions so it may be turn out a government of laws and not of men. Similarly, in a democratic form of government, it is of great concern not only to provide safeguard against the tyranny of its rulers, but to protect society's one part against the injustices of the other part.<sup>285</sup> Madison sought to overcome governmental tyranny, which is closely linked with the arbitrary and capricious government. Madison conceived a situation where governmental tyranny will not be the outcome of concentration of powers, and idealize a situation where those having collective governmental authority will not necessarily be above the law or exploit the rules according to their personal whims. Nevertheless, concentration of powers over an extended period of time will certainly result governmental tyranny for benevolent dictators are hard to come by.<sup>286</sup>

Madison's viewpoint that separation of powers, being an essential requirement for non-tyrannical government, enforces a restriction on his hypothetical approach for other values and concerns need alteration with this fundamental condition. The foregoing debate reveals Madison's desire to capitalize two parallel objectives: separation of powers and republicanism. Madison and most of the framers advocated the idea of imposing restrictions on the realm of majority decision-making, which is consistent with the philosophy of constitutionalism.<sup>287</sup> Keeping in view the limitations

<sup>284</sup> Carey, George W. "Separation of Powers and the Madisonian Model: A Reply to the Critics." *American Political Science Review* 72, no. 1 (1978): 154.

<sup>285</sup> The Federalist, p. 351.

<sup>286</sup> Carey, George W. "Separation of Powers and the Madisonian Model: A Reply to the Critics." *American Political Science Review* 72, no. 1 (1978): 156.

<sup>287</sup> Federalist 78 where special reference has been made to judicial review.

of this theory, the Constitution could only be changed through the amendment process. Separation of powers, being constitutional fabric, is inseparable and immune from modification or obliteration by simple majorities. The foregoing analysis and its designated role in the Madison's model, the separation of powers open more avenues for research for the intended roles of the three branches. Even though, a system of government fairly realizing political equality and majority rule, without active separation of powers, will consequently turn into tyranny.

### **3.3.2. Rise and Fall of the Doctrine of Separation of Powers**

The US Constitution of 1789 is considered to be a prudent compromise, rather than principle because it derived more from experience than from the doctrine. Since its inception, the US Constitution has controlled the allocation of government's powers and imposed constraints on the undue exercise of those powers. *Professor Paul Freund* regarded it as a structure as well as an organism, which should not be treated just as a statute. The Constitution partially uses words and phrases that resonate with meanings derived from history and common law. Similarly, some of the Constitution's parts must have meanings subject to the context in which they are being applied. For instance, federalism and separation of powers are fundamental conceptions, not attachable to any specific word or provision, which must be worked out by addition and subtraction of language and history.<sup>288</sup>

The original constitutional conception of dividing power was not confined to separation of powers; rather it was based on the concept of a balanced government and a system of checks and balances. This system suggested oversight of one by other or the consensus of two or more governmental agencies for the validity of an action.

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<sup>288</sup> Kurland, Philip B. "The Rise and Fall of the "Doctrine" of Separation of Powers." *Michigan Law Review* 85, no. 3 (1986): 592.

Indeed, *Madison's* realization for the powers' division proposes a more substantial idea of balancing governmental power. The separation of powers definitely encompasses the idea of fundamental difference in the governmental functions, frequently denoted as legislative, executive, and judiciary, which must be maintained separately, each to exercise sovereign authority in its own sphere, none to operate in the realm designated to another. The same tendency is prevalent in the modern era about constitutional separation of powers which *Madison* wrote in 1788.

Since its inception, the US Constitution is not the product of theory but experience as is not just a paraphrase of Holmes' dictum in *The Common Law* about law and logic that "the life of law has not been logic: it has been experience".<sup>289</sup> It has got recognition and acknowledgment at the Convention of 1787. Mr. Dickenson furthered the idea that experience must be our only guide, reasons may mislead us.<sup>290</sup> In the eyes of the new constitution-makers, John Locke and James Harrington were perhaps the only political theorists equal to the stature of Montesquieu. Locke asserted three categories of powers: legislative, executive, and federative. In modern day the 'federative' may referred to 'foreign affairs', which was allocated to the executive branch of the government.<sup>291</sup>

The US retained Aristotelian form of government, but distributed political powers making essentially homogeneous, which according to Jefferson, became the first principle of good governance. The distribution of its powers into executive, judiciary, and legislature, and further division of the latter into two or three branches was only partitioning of the political powers. The underlying objective of the creation of a polarity of government's branches was manifold: to make all isolated yet

<sup>289</sup> Holmes, Oliver Wendell, *The Common Law*. Harvard University Press, 2009.

<sup>290</sup> Tansill, Charles Callan, *Documents Illustrative of the Formation of the Union of the American States*. Vol. 398. (US Government Printing Office, 1927).

<sup>291</sup> Ashcraft, Richard, *Revolutionary politics and Locke's two treatises of government*. (Princeton University Press, 1986): 382-84.

responsible and controlled by people, checking and balancing each others, and preventing anyone from asserting itself too far. As evident from the *Montesquieu*'s resort to the British model, *Madison* asserted that *Montesquieu* did not strictly rejected partial overlapping of the governmental departments. He was only concerned that where complete authority of one branch is thoroughly used by the same hands, having complete authority of another branch, the basic principles of a free constitution are challenged.<sup>292</sup>

The new conception of balancing powers was well described by Professor *Wood*, which was referred to by *Madison* that connected man's interest with the constitutional rights. Controlling governmental abuses must be a reflection of human nature. The government is nothing except the supreme of all reflections on human nature. No government would be required if men were angels. Likewise, there was no need for external or internal governmental control if angels were to govern men. In order to design a government, where men have to govern men, two biggest challenges are faced: permit the government to control the subjects and force the government to control itself. No doubt, government's dependence on people is considered to be the principal control on the government, however experience taught inevitability of ancillary precautions.<sup>293</sup>

Both *Madison* and *Hamilton* believed that democratic legislature was the potential threat towards concentration of all governmental powers. The others believed that the singular executive is a danger of tyranny. Judiciary contributed a very minute role in the theoretical constructs of *Montesquieu* and *Locke*. Nonetheless, judiciary was of key importance in the conceptualization of limited constitution, in order to limit legislative authority. Even through the framers of the Constitution

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<sup>292</sup> The Federalist No. 47, pp. 325-26.

<sup>293</sup> The Federalist No. 51, J. Madison J. Cooke, ed. 1961, p. 349.

believed judicial review may exceed its jurisdictional circle, the invention of judicial review in separation of powers became an essential element. According to *Edward Levi*, the framers of the Constitution had not envisaged a government that sought confrontation; rather they believed that the system of checks and balances would make it more harmonious.<sup>294</sup>

Separation of powers was not a measure to validate a particular governmental action, rather it was a construct on which the constitution was framed. The growth in judicial branch's stature was consequent upon the failure of the principle of separation of powers.<sup>295</sup> The object behind its invocation was to effectuate the government's powers separately, in order to protect liberty of people. Further, history itself evident that vigilant judiciary was the only tool between the potential tyranny of the branches and people's liberty.

### 3.3.3. Separation of Powers: Functionalist and Formalist - Two Competing Approaches

The US Supreme Court while analyzing the issue of separation of powers used two competing approaches: the functionalist method and the formalist method. Both concepts have its advantages and disadvantages. Nevertheless, with the decision of *Morrison v. Olson*<sup>296</sup>, the Court's analytical method seems to have been changed from formalist approach to functionalist approach. Due to its positive effects on inter-branch behavior, functionalism is the ultimate method of choice. Unlike unproductive positional bargaining which may be the outcome of formalist approach, functionalism's balancing test motivates problem-resolving negotiations between

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<sup>294</sup> Levi, Edward H. "Some aspects of separation of powers."  *Colum. L. Rev.* 76 (1976): 371, 391.

<sup>295</sup> *Ibid.*

<sup>296</sup> 108 S. Ct 2597 (1988)

political actors. These negotiations help resolve political matters politically, leaving courts as a last resort.

In the recent past, there have been debates and concerns regarding separation of powers. The US Supreme Court, in its various decisions<sup>297</sup>, has dealt with issues involving legislative-executive conflicts and judiciary's role therein. In these cases the US Supreme Court has applied both functionalist and formalist approaches in order to resolve disputes regarding separation of powers.

### **3.3.3.1. Functional Approach**

Functional method interprets the Constitution that contemplates separate powers of three governmental branches are not to operate with absolute independence. In order to make a workable government, the Constitution ensures its branches' separateness but inter-dependence, autonomy but reciprocity.<sup>298</sup> Keeping in view checks and balances that operate between each branch, a functionalist approach examines whether the alleged act has impermissibly prohibited one branch from performing its constitutionally assigned functions. This method involves two things: determination of each branch's functions involved with the disputed act and realistic impacts on these branches. While considering the fact whether or not a branch's core function has been hindered or intervened, the functionalist method stresses on balance and flexibility by analyzing the whole structure of relationship among the branches.<sup>299</sup> The courts while applying functionalist test, limit their role in order to resolve inter-

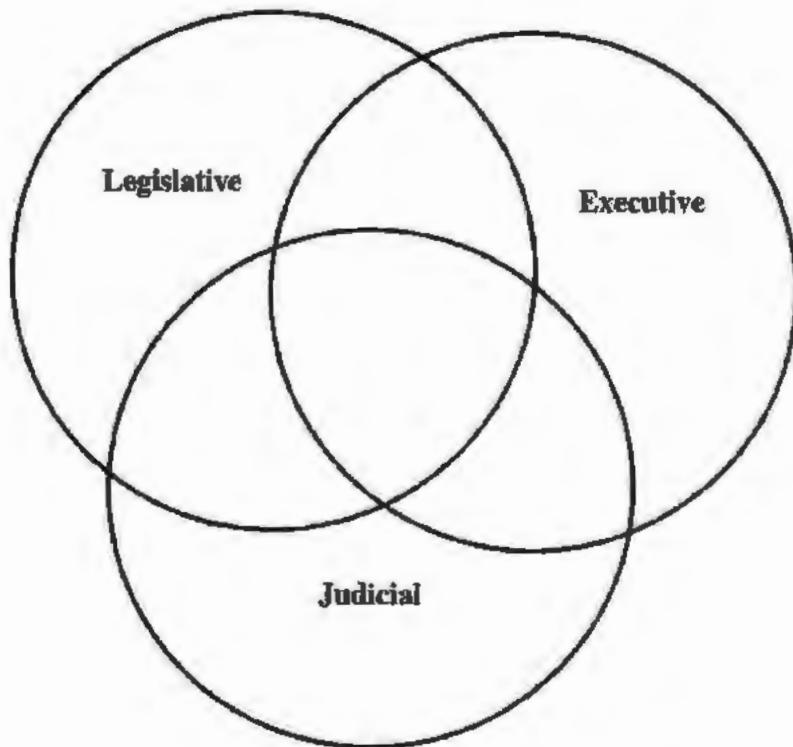
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<sup>297</sup> *United States v. Nixon*, 418 U.S. 683 (1974) (Even though, executive-judicial conflict was involved in this case, it is cited because functionalist approach was used.); *Immigration & Naturalization Service v. Chadha*, 462 U.S. 919 (1983); *Bowsher v. Synar*, 478 U.S. 714 (1986); *Morrison v. Olson*, 108 SC 2597 (1988).

<sup>298</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952).

<sup>299</sup> Strauss, Peter L. "Formal and Functional Approaches to Separation of Powers Questions A Foolish Inconsistency." *Cornell L. Rev.* 72 (1986): 520.

branch disputes. The following figure highlights diagrammatical view of functionalist approach.

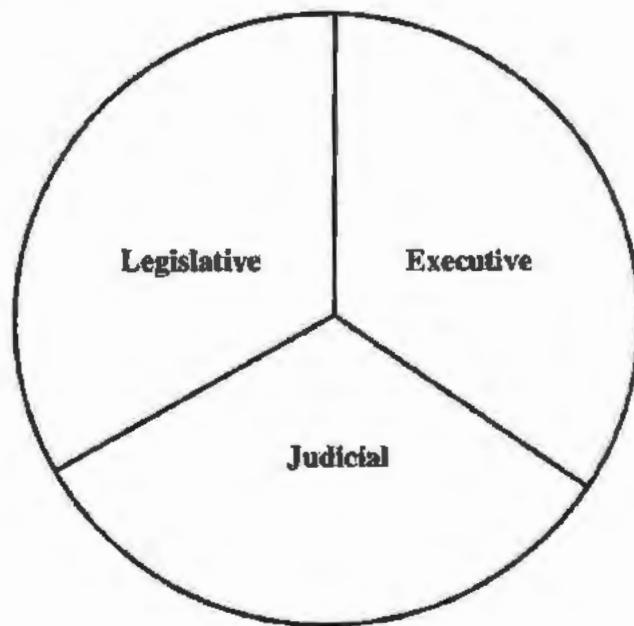


**Figure 1: Functionalist Approach towards Governmental Branches**

### **3.3.3.2. Formalist Approach**

Contrary to functionalist approach, formalist method is grounded upon the belief that separation of powers requires each governmental branch to perform its functioning while maintaining optimum independence. The proponents of formalism argue that the division of governmental authority into three branches was aimed to safeguard against the potential tyranny. In order to maintain this protection, the best course is to enforce a strict division of labor among the branches. In nutshell, formalist test seeks to address inter-branch conflicts by drawing a sharp line among the governmental branches and confining every branch to its designated

responsibility.<sup>300</sup> In the formalist approach, there is no concept of checks and balances as each branch has to work within its jurisdictional circle and not to interfere with the work of other branches. The following figure highlights diagrammatical view of formalist approach.



**Figure 2: Formalist Approach towards Governmental Branches**

### **3.3.3.3. Formalist and Functionalist Approaches: Perceived Pros and Cons**

The inconsistent approach of courts while dealing with inter-branch disputes explore that both concepts have its advantages and disadvantages. The proponents of formalism argue that formalist approach draw clear and distinctive lines that contribute stability in the government's branches that ultimately ensures rule of law. Moreover, the institutional-demarcations help reduce uncertainty in inter-branch conflict resolutions.<sup>301</sup> Nonetheless, such rules, being rigid, create hindrances for each branch while dealing with the changing political realities. The opponents, however,

<sup>300</sup> *Immigration & Naturalization Service v. Chadha*, 462 U.S. 919 (1983)

<sup>301</sup> Strauss, Peter L. "The place of agencies in government: Separation of powers and the fourth branch." *Columbia Law Review* 84, no. 3 (1984): 625-26.

criticized formalism for constituting improper judicial activism in political disputes by leaving these to the elected branches. Both improper judicial activism and inflexibility of formalist approach counterbalances the ease in decision-making that the clear line drawing aspect of formalist method produces.<sup>302</sup>

The greatest perceived benefit of functionalist approach is its stress on checks and balances that reflects institutional realities.<sup>303</sup> Functionalism considers overall conditions of each legislative-executive conflict. While protecting fundamental democratic principles, it easily accommodates both governmental as well as societal changes. Nevertheless, the opponents to functionalism criticize it for its inherent tensions. Even though formalists are criticized for rigid doctrinism, but in case of legislative-executive conflict, functionalist test consider a determination of each branch's functions and realistic effects thereof. Judges must consider each function, in order to balance the effect of the issue and each branch's interest, which make the application of functionalist test more complicated.<sup>304</sup>

The above analysis unveil that both formalist and functionalist methods for resolving separation of powers disputes are not entirely satisfactory. Some critics discourage judicial involvement in the legislative-executive conflict and endorsed that these problems should be addressed through political process. They believed that the system of checks and balances provides sufficient mutual control over the legislative and the executive branches, making the system self controlling, and discouraging judicial intervention. Judicial intervention exposes it to retaliation by the more

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<sup>302</sup> Clair, Suzanne Prieur. "Separation of Powers: A New Look at the Functional Approach." *Case W. Res. L. Rev.* 40 (1989): 337.

<sup>303</sup> Sargentich, Thomas O. "Contemporary Debate About Legislative-Executive Separation of Powers." *Cornell L. Rev.* 72 (1986): 439.

<sup>304</sup> Clair, Suzanne Prieur. "Separation of Powers: A New Look at the Functional Approach." *Case W. Res. L. Rev.* 40 (1989): 338.

powerful branches, and is considered counterproductive.<sup>305</sup> Nonetheless, courts' total-abandonment in the political process is not desirable. Even though, interbranch disputes should be amicably settled by political process, judicial involvement remains indispensable. Keeping in view the principle of judicial restraint, judiciary should keep a limited control. Judicial involvement is required only in the cases of political breakdown, where the system is no longer self-controlling. Considering the effect of judicial test on institutional behavior, functionalism is favorable approach. It advances the objective of limited judicial involvement and contributes in making the government functional by encouraging legislative-executive cooperation.

### 3.3.4. The Trichotomy of Powers – Pakistan's Perspective

Since its inception, Pakistan has been an executive influenced state that corresponded to the Mughals' reign and to the British Raj in the Indian subcontinent. In the Mughals' period, the emperor was considered to be the sole legislator, the chief executive, and the chief head of the empire who concentrated all the legislative, executive, and judicial powers. The emperor ruled the subjects by decrees, *Shahi Farmans*. Further, there was no concept of constitution during the Mughal rule which lasted from sixteenth to nineteenth century. The Britishers introduced to the subcontinent as merchants and gradually took hold of the subcontinent, disbanding the Mughals' rule in 1858.<sup>306</sup>

In order to govern the subcontinent, the British Parliament passed a series of Acts.<sup>307</sup> The Government of India Act, 1935 conferred wide-ranged authority to the

<sup>305</sup> Choper, Jesse H. *Judicial review and the national political process: A functional reconsideration of the role of the Supreme Court*. (Quid Pro Books, 2013): 311-15, 378-79.

<sup>306</sup> Hamid Khan. *Constitutional and political history of Pakistan*. ed. 2<sup>nd</sup> (Oxford University Press, USA, 2009): 3-4.

<sup>307</sup> The Government of India Act, 1858, Government of India Council Act, 1861, the Minto-Morley Reforms, 1909, the Government of India Act, 1919, and the Government of India Act, 1935.

Governor General, Viceroy. In the subcontinent, being representative of the British crown, the Viceroy got final political authority and was entrusted with vast discretionary authority. He concentrated the authority of all forces: the army, the navy, and the air force. He had special legislative powers and could seek council's advice except on matters related to external affairs, defense, and matters where his special responsibility was involved. Further, he was not bound by the ministerial advice. The Act also contained certain emergency provisions authorizing the Governor General to extend his authority to all or any of the powers being exercised by the federal authorities, with the exception of the federal court.<sup>308</sup>

The Government of India Act, 1935 with slight modifications, became the first working constitution of Pakistan. Similarly, the first Constituent Assembly of Pakistan was created by virtue of the Indian Independence Act, 1947. This Act conferred the Constituent Assembly with the task of drafting the constitution. The Act also authorized the cabinet to perform governmental activities. The Governor General's powers were subject to the advice of the cabinet. Nevertheless, the cabinet was responsible to the Constituent Assembly. Even though, Pakistan came forward as a parliamentary government. However, virtually it has been turned to an administrative state with viceregal traditions.<sup>309</sup>

The Governor General's office, later on was replaced with the president's office, enjoyed broad discretion and had the authority to promulgate ordinances. Being the executive head of the state, the Governor General had the authority to appoint high officials: the Prime Minister, the Federal Ministers, and Judges of the Superior Courts. In some exceptional circumstances, the Government of India Act, 1935 also authorized the Governor General to dismiss the Prime Minister without

<sup>308</sup> Ibid., p. 21.

<sup>309</sup> Ziring, Lawrence. *Pakistan in the twentieth century: A political history*. (Karachi: Oxford University Press, 1997): 72-73.

taking into account the advice of the Council of Ministers. The viceregal system of government inherited from the British was not discarded in subsequent years. As evident from 1947 to 1956, Pakistan had experienced four successive Governors Generals and three Prime Ministers.<sup>310</sup>

In 1956, the first Constitution of Pakistan was promulgated, which abolished the Governor General's Office and extended the same authority to the President. Despite the fact, the Prime Minister presided over by the cabinet, with one house of Parliament, National Assembly. The president's executive authority was more than that of the elected Prime Minister. Despite the fact that the Constitution envisaged the Parliamentary form of Government with federal structure, the President remained authoritative and the Provinces were having less authority than the Center.<sup>311</sup> The first Martial Law was enforced in 1958 whereby the 1956 Constitution was suspended. In 1962, another Constitution was promulgated by the Army, which abolished the Prime Minister's Office and conferred all the Executive Powers on the President. Ayub Khan, the Chief Martial Law Administrator, became the President of the country and concentrated so many powers, such as dissolution of Assembly, issuance of Ordinances, and declaration of Emergency. Ayub Khan lifted martial law with the promulgation of the 1962 Constitution. Apparently, it was a civilian rule, nevertheless, the entire political system revolved around Ayub Khan. The 1962 Constitution institutionalized the military intervention into politics.<sup>312</sup>

In 1969, the country faced another martial law, after a mass movement against Ayub Khan that led to his resignation. This was followed by tragic events: the Indo-Pak war of 1971 and the secession of the East Pakistan, now Bangladesh. In 1973,

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<sup>310</sup> Ibid, 176.

<sup>311</sup> Newberg, Paula R. *Judging the state: courts and constitutional politics in Pakistan*. Vol. 59. (Cambridge University Press, 2002): 23.

<sup>312</sup> Ziring, Lawrence. *Pakistan in the twentieth century: A political history*. (Karachi: Oxford University Press, 1997): 266.

Pakistan adopted another Constitution that envisaged a parliamentary form of government, comprised of the National Assembly and the Senate. Further, the Constitution also endorsed Provincial governments distributing legislative powers between the Federation and the Provinces. The new Constitution conferred the chief executive authority on the Prime Minister and the President, being a formal head of the state, was required to act on the Prime Minister's advice.

In 1977, the Army Chief, Zia-ul-Haq, disbanded the National Assembly and dismissed the PPP's government. The Constitution was suspended and replaced with the Provisional Constitutional Order (PCO), which legalized military intervention and allowed constitutional amendments. By virtue of the Eighth Constitutional Amendment, the executive authority was extended to the President from the Prime Minister, and the President was further empowered to dissolve the National Assembly.<sup>313</sup> Like colonial viceroy, the President assumed extraordinary authority, in order to regulate the state affairs.

In 1988, after Zia's death, both Benazir Bhutto and Nawaz Sharif served for two terms each, but neither of them could complete their duration as both had been dismissed by the incumbent presidents on corruption charges, and dissolved the assemblies before completion of their term. In 1997, through introduction of Thirteenth Constitutional Amendment, the Parliamentary sovereignty was restored and the Prime Minister, Nawaz Sharif, was authorized to dissolve the National Assembly. Since Pakistan's inception, it has been a continuous practice that each state's and government's heads inclined to enjoy all the executive powers.

In 1999, military again intervened which was justified by the Court on the touchstone of state necessity. The Court validated Musharraf's emergency and PCO

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<sup>313</sup> Article 58 (2) (b) of the Constitution of Pakistan, 1973.

orders. Through a referendum in April 2002, Musharraf not only elected himself as a President for five years but also introduced the Legal Framework Order (LFO). The LFO revived Eighth Amendment Clauses and made him more powerful. In 2003, Seventeenth Constitutional Amendment was introduced whereby Parliament was reduced to the level of a rubber stamp.<sup>314</sup> The President kept himself with the legislative initiatives as evident between 2002- 2007, the President has promulgated 134 Presidential Ordinances, whereas only 51 Bills were passed by the National Assembly.<sup>315</sup>

In February 2008, the PPP government, in general elections, got majority of the seats and formed a coalition government. In the new democratic setup, the President enjoyed significant powers. Nonetheless, on April 8, 2010, the National Assembly passed Eighteenth Constitutional Amendment, which curtailed president's power to dissolve Parliament unilaterally. This amendment initiated a series of changes; permitted the Prime Minister to serve for more than two terms, bar on the courts to validate suspension of the Constitution, the Judicial Commission for the appointment of judges, and bar on the President's authority to appoint Election Commission's head and declaration of emergency unilaterally.<sup>316</sup> Nevertheless, judiciary showed concerns on the appointment procedure.

In order to avoid potential conflict between executive and judiciary on appointment matters, Nineteenth Constitutional Amendment was introduced. This amendment incorporated certain changes in the Judicial Commission and the appointment process: the number of judges in the Judicial Commission was raised to four increasing strength of the Judicial Commission from seven to nine. For ad hoc

<sup>314</sup> Sultana, Tasneem. "Montesquieu's doctrine of separation of powers: A case study of Pakistan." *Journal of European Studies* 28, no. 2 (2012): 67.

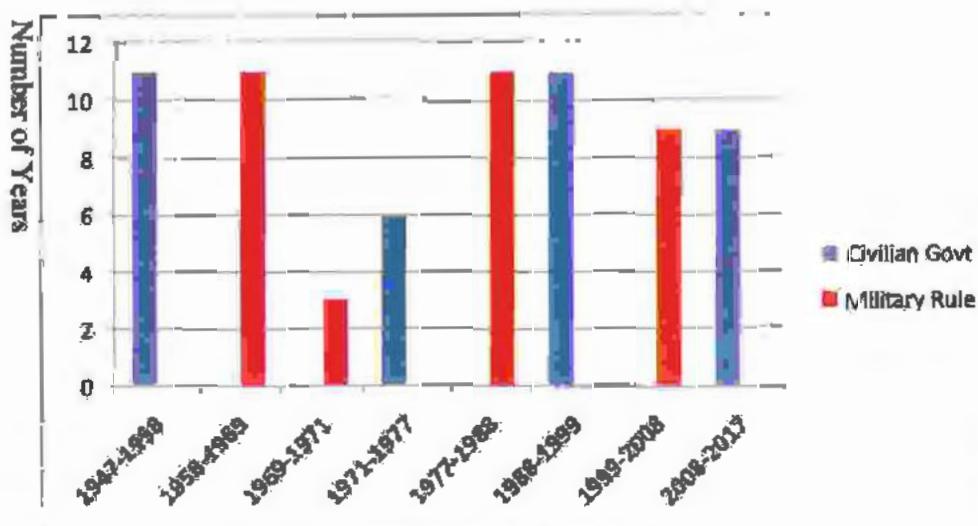
<sup>315</sup> Ibid.

<sup>316</sup> Ibid. 68.

judges' appointment, the Chief Justice has to consult the Judicial Commission, and has to seek approval from the Senate, where the National Assembly dissolved and the Parliamentary Committee, which gives final approval of the judges' appointment, ceased to exist. One of the underlying objectives of 18<sup>th</sup> and 19<sup>th</sup> Amendments was to avoid conflict between the state institutions.

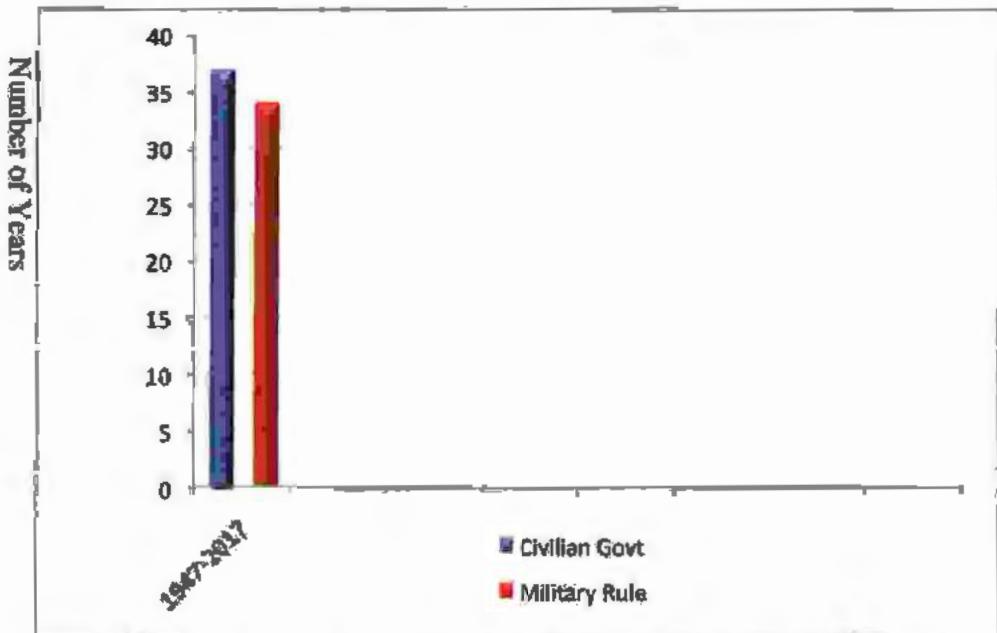
Judiciary played a crucial role in undermining the parliamentary sovereignty and determining the country's political destiny. Judiciary while validating military coups not only undermined the representative institutions but also reduced its own autonomy. Judiciary has accepted constraints on its own autonomy while validating extraconstitutional and undemocratic acts. This self-constraints on judicial autonomy was first witnessed when the Prime Minister *Muhammad Ali Bogra*'s government was dismissed by the then Governor General, *Ghulam Muhammad*. The Supreme Court observed that necessity makes unlawful acts lawful. Judiciary repeatedly legalized the military's interventions on the pretext of so-called necessity doctrine at the expense of civilian governments and its own autonomy.<sup>317</sup>

The following charts highlight the military's direct rule and fragile democracy in Pakistan.



<sup>317</sup> Cohen, Stephen Philip. "The Idea of Pakistan, Lahore." (2005): 58.

**Figure 3: Duration and Number of Years of Military and Democratic Rules**



**Figure 4: Total Span of Military and Democratic Rules (1947-2017)**

As depicted in these Charts, for half of its political journey, army had kept Pakistan under its direct reign. During its direct rule, the army had entrenched its authority and has made arrangements, in terms of making coalition with the politicians and political groups, in order to transform its authority to the representative governments and ensure its indirect governance in the civilian rule. In transformation of army's control, judiciary significantly contributed and legitimized army's extraconstitutional acts on the pretext of state necessity, at the expense of the civilian government and compromised its own autonomy as well. While validating their extraconstitutional actions, judiciary has gradually circumscribed military's control.

In the recent struggles toward judicial independence, judiciary has not only considerably succeeded in safeguarding its autonomy from the military, but also forwarded the same efforts against the civilian government. In order to overcome the potential threats of confrontation between Judiciary and Parliament, 18<sup>th</sup> and 19<sup>th</sup>

Constitutional Amendments were introduced. However, leaving any branch including judiciary without reasonable control is against the spirit of separation of powers and checks and controls.

Both Islam and western democracies believe in moderate approach. Pakistan's democracy which is going through its transition, judiciary stands with no exceptions and is susceptible to exploitation by other state organs and at the same time creates apprehension of misusing its authority if left uncontrolled. In the prevalent circumstances, absolute autonomy is not an ideal approach. There should be some constraints in order to control its unbridled authority. While imposing these constraints, a mechanism of balanced judicial autonomy and constraints thereof must be devised, in order to ensure real judicial independence without any exploitation of its authority by other state actors or state institutions.

### **3.4. THE ESTABLISHMENT OF MILITARY COURTS IN PAKISTAN AND ITS IMPLICATIONS ON TRICHTOMY OF POWERS**

Military has directly ruled Pakistan for more than three decades<sup>318</sup> and drastically entrenched its authority into the civilian governments. Besides its interventions in the civilian governments and transformative preservation of its authoritarian regime, military has significantly influenced the judicial branch which consequently validated military takeovers and supported its affiliated interests. To further entrench its authority, military has constituted its own judicial mechanism, parallel to the conventional judicial fabric, which is now extended to the civilians' trials. This state of affairs has adversely affected the democratic transition, trichotomy of powers, and the administration of justice to a great extent.

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<sup>318</sup> by Ayub Khan from 1958 to 1969, by General Yahya Khan from 1969 to 1971, by General Zia-ul-Haq from 1977 to 1988, and by General Pervaiz Musharraf from 1999 to 2008.

### 3.4.1. Military Courts in Pakistan – a Brief History

The establishment of military courts for the civilian trial through 21<sup>st</sup> Amendment to the Constitution is not a novel concept. In the previous decades, the governments have authorized military courts with the authority to trial civilians. Establishment of military courts by the civilian governments in April 1977 and 1998 were struck down by the judiciary because the Constitution does not have any room for these courts.<sup>319</sup> After 1977 elections, Zulfikar Ali Bhutto had constituted 'Summary Military Courts' under Article 245<sup>320</sup> in response to the agitation of the opposition parties against the alleged rigging in general election, which threatened to create a law and order situation. The provincial governments of Sindh and Punjab were unable to handle the situation. The government also made certain amendments to the Army Act, 1952. Invoking the Article 245 for helping in the governance maybe referred to the establishment of military rule through the civilian government. Article 245 also ousted writ jurisdiction of the High Courts. Consequently, individuals were deprived to protect and enforce their fundamental rights as guaranteed under Article 199 of the Constitution.

This initiative of the Government was challenged in Sindh and Punjab High Courts.<sup>321</sup> Both courts declared government's action unconstitutional and declared that the government cannot invoke Article 245 to reign through armed forces. Similarly, during his second term as a Prime Minister, Nawaz Sharif permitted the establishment of Military Courts in Sindh by an Ordinance.<sup>322</sup> The government invoked Article 245 and called armed forces to assist the civilian government. The

<sup>319</sup> Sheikh Liaquat Hussain and others v. Federation of Pakistan, PLD 504 (SC 1999).

<sup>320</sup> Article 245 of the Constitution of Pakistan, 1973.

<sup>321</sup> Niaz Ahmed Khan v. Province of Sindh, PLD 604 (Karachi HC 1977); Darwesh M. Arby v. Federation of Pakistan and others, PLD 206 (LHC 1980).

<sup>322</sup> Pakistan Armed Forces (Acting in Aid of the Civil Power) Ordinance, 1998, Ordinance XII of 1998.

Ordinance authorized Chiefs of the Armed forces and Brigadiers to constitute as many courts as required including the courts of appeals. Section 3 of the Ordinance authorized Military Courts to try civilians within three days. An appeal against the decision could be made to the courts of appeal convened under Section 3 of the Ordinance, which was required to decide the appeal within three working days. In terms of appeal, Section 8 (5) of the Ordinance ousted jurisdiction of all other courts including the High Courts and the Supreme Court.

This act of the Government was challenged in *Sheikh Liaqat Hussain and others v. Federation of Pakistan*<sup>323</sup> the Court declared Military Courts to be unconstitutional having no legal effect. The Court observed that neither the government nor the armed forces could act beyond the limits and scope of the Constitution. Nevertheless, two convicts, who were awarded death sentences, had already been executed by military. The Court directed that the terrorism related cases be referred to the Anti Terrorism Courts (ATCs) constituted under the Anti-Terrorism Act, 1997. The Court also directed the ATCs to dispense with the case within seven days of institution. Ironically, both efforts to establish Military Courts were followed by military coups. One of the fundamental issues associated with Military Courts was the issue of jurisdictional conflict with the ATCs and ousting of the superior courts' jurisdiction in Appeal matters was another serious issue. Authorizing Military Courts at the expense of already established judicial system is not considered to be a sound decision in the democratic transition.

Likewise, General Zia, after third military intervention, initiated various policies and reforms at the expense of the civilian government and judicial autonomy. By virtue of Second Amendment to the Constitution, Article 212A was incorporated

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<sup>323</sup> *Sheikh Liaqat Hussain and others v. Federation of Pakistan*, PLD 504 (SC 1999).

whereby Military Courts were established for the trial of offences under the Martial Law Regulations. These courts were given retrospective effect and were deemed to have taken effect on July 5<sup>th</sup>, 1977. Moreover, these courts had also ousted jurisdiction of the other courts including the High Courts, where the matter was within the jurisdiction of the Military Courts.<sup>324</sup> Resultantly, more than one hundred Military Courts were established and decision made by these courts got immunity from civil courts.

In the same manner, on July 28, 1991, the government established Special Courts for the trial of heinous offences. By virtue of Twelfth Constitutional Amendment to the Constitution, Article 212B was incorporated for a period of three years, in order to ensure speedy trial. This amendment authorized the Federal Government to establish as many special courts as the government deemed necessary and the federal government has to determine their jurisdictional limits accordingly. The Federal Government was further authorized to appoint judges for these special courts. The Act also authorized the Federal Government to appoint a person as a judge to the Special Court without any legal qualification and with security of tenure till the article was effective. These Special Courts had also ousted the jurisdiction of the civilian courts, including Superior Courts.<sup>325</sup>

### **3.4.2. Recent Developments and the Scope of Military Courts**

In Jan 2015, after brutal attack of six terrorists on the Army Public School (APS), Peshawar on December 16, 2014, that witnessed massacre of about 150 lives, the government legalized military courts' trial of the suspected terrorists for a period of two years. The All Parties Conference (APC) consented modification to the Army

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<sup>324</sup> Article 212A (omitted via SRO No. 1278, (I) 85) of the Constitution of Pakistan, 1973.

<sup>325</sup> Article 212B of the Constitution of Pakistan, 1973 (omitted in July 1994).

Act, 1952 so as to extend its jurisdiction for speedy trial. On January 7<sup>th</sup>, 2015, Parliament passed 21<sup>st</sup> Constitutional Amendment<sup>226</sup> with *sunset clause*, whereby Military Courts shall cease to effect after two years of its commencement. From February 2015 to March 6<sup>th</sup>, 2017, Military Courts have convicted 274 persons. Eleven Military Courts have been constituted across Pakistan: four each in Punjab and KP, two in Sindh, and one in Baluchistan.

By virtue of the 21<sup>st</sup> Constitutional Amendment, various Acts<sup>227</sup> have been incorporated into the first schedule of the Constitution, in order to ensure them exemption and safeguard from the operation of Article 8 (1) and (2) of the Constitution, which invalidate laws and enactments of Parliament violating Fundamental Rights protected under the Constitution. Further, Amendment to the Army Act, 1952 authorized Military Courts to try civilians including individuals, groups, organizations, or sects for the offences related to violence and terrorism. This Amendment brought forth a very broad genre of offences into the domain of Military Courts: attack on the military officials or their installations, position and transportation of explosives and firearms, use of vehicles for terrorist activity, offences causing death or serious injuries, creating terror and insecurity, threat to the state's security, or general public, funding or receiving funds for any of the aforementioned purposes, waging anti-state war, attempting to commit any of the listed acts.

Additionally, by virtue of these Amendments, certain offences were incorporated in Protection of Pakistan Act, 2014, to which Military Courts' jurisdiction was extended. Provided, if these crimes are suspected to have been executed by any organization or terrorist group by using name of any religion or sect:

<sup>226</sup> The Constitution (Twenty-first Amendment) Act, 2015.

<sup>227</sup> The Pakistan Army Act, 1952, the Pakistan Air Force Act, 1953, The Pakistan Navy Ordinance, 1962, and the Protection of Pakistan Act, 2014.

crimes against minorities, killing, kidnapping, or attacking important personalities such as government officials, judicial authorities, foreign officials, media personnel, social workers, and tourists, attacking energy facilities, transportation, and educational institutions, and crossing of territorial limits of the state for any of the aforesaid offences.

The 21<sup>st</sup> Amendment to the Constitution explicitly articulated “*sunset clause*” that military courts shall cease to effect after the expiry of two years, i.e., January 6<sup>th</sup>, 2017. Nevertheless, on the pretext of national interest and the existence of grave and unprecedented threats to the integrity of Pakistan, Parliament, by virtue of 23<sup>rd</sup> Constitutional Amendment, extended functioning of these courts for a further period of two years.<sup>328</sup> Similarly, the Army (Amendment) Act, 2015 (II of 2015), which was repealed on January 6, 2017 was further extended for two years.<sup>329</sup> This Act incorporated certain procedural reforms: An accused arrested under this Act shall be provided grounds of arrest within twenty-four hours,<sup>330</sup> right to engage counsel at the trial of the accused,<sup>331</sup> provisions of the QSO, 1984 were extended to this Act<sup>332</sup>, and in case of any conflict with other laws this Act shall prevail.<sup>333</sup>

### **3.4.3. Procedure Adopted by Military Courts**

One of the controversies regarding Military Courts is the lack of procedure's disclosure. Neither the Government nor Military disclose the procedure being adopted by Military Courts, in order to prosecute cases. The authorities are also reluctant to share names of the accused person being charged by Military Courts. Similarly, there

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<sup>328</sup> The Constitution (Twenty-third Amendment) Act, 2017.

<sup>329</sup> The Pakistan Army (Amendment) Act, 2017.

<sup>330</sup> Section 2 (IV) (d) of the Pakistan Army (Amendment) Act, 2017.

<sup>331</sup> Section 2 (IV) (e) of the Pakistan Army (Amendment) Act, 2017.

<sup>332</sup> Section 2 (IV) (f) of the Pakistan Army (Amendment) Act, 2017.

<sup>333</sup> Section 4 (2) of the Pakistan Army (Amendment) Act, 2017.

is no disclosure of information with reference to time and venue of trials that consequently diminish the prospects of public access to such proceedings. On April 2, 2015, Military Courts convicted seven persons for committing undisclosed offences, six to death and one life imprisonment. The Supreme Court Bar Association challenged these convictions and alleged that the right to fair trial is not protected that is contrary to the Fundamental Rights protected under the Constitution. According to the Government and Military Officials, the trial's procedure is identical to that of courts martial as provided under the Army Act. So far as configuration of these courts is concerned, Military Court is normally comprised three to five serving officials, not necessarily possessing legal qualification.

Like regular civilian courts, the Army Act has the same criteria for evidence and proceedings before Courts Martial. Furthermore, the Federal Government was allowed to transfer proceedings pending before any other court to a Military Court for the prescribed offences. The Amended Military Act allowed in-camera trials and punishment for the offences at anyplace. Similarly, an accused has the right of appeal to Military Appellate Tribunal against death sentence and imprisonment exceeding three months. The Appellate Tribunal is presided over by a military officer of Brigadier rank, the Chief of Army Staff, or any of his authorized officials not necessarily possessing legal qualification. The tribunal is empowered to omit, reduce, or increase the punishment. Any decision of Military Court which is upheld by the Appellate Tribunal of Military is final, ousting appellate jurisdiction of civilian judiciary including High Courts and the Supreme Court.

### **3.4.4. Justifications for the Establishments of Military Courts**

The establishments of military courts are mainly justified on two grounds: speedy trial and failure of civilian courts to convict suspected terrorists. Throughout the historical analysis of military courts, speedy trial is a common feature for constitution of Military Courts, despite the fact that the Anti Terrorism Courts were directed by the Supreme Court to conclude cases within seven days. ATCs were meant to try cases of heinous nature without any delay, in order to shift burden of work from the criminal courts, which are already burdened with the civil and criminal cases. After APS attack, the civilian courts were severely criticized by the public representatives, the parliamentarians, the military officers, and the media personnel for not convicting terrorism suspects.

The opponents of the civilian courts criticize civilian courts for lengthy trials, overloaded dockets, lingering proceedings, and lack of will to convict the responsible persons for terrorist attacks. These opponents of the civilian courts argue that the Military Courts are the best options for the prosecution of terrorists, in order to overcome potential terrorist attacks. Nevertheless, the proponents of the civilian courts considered some other factors for the lack of convictions of the individuals charged with offences of terrorism: defective prosecution, lacunas in investigation, and insecurity to the witnesses. Unlike military officers, civilian judges and their families are facing relatively greater risks of threats and violence. Despite the inability of the government in providing security to the civilian judges, the prosecutors and the witnesses blame the civilian judiciary for not convicting the terrorism suspects. The government, at the cost of reforms and security to the civilian judiciary, constitutionalized the establishment of a parallel judicial system, administered by people without legal wisdom and caliber. A system, where

individual's right to fair trial has no value and where more than ninety percent convictions are based solely on the confessions of the accused persons, is prioritized over the civilian courts.

#### **3.4.5. The Impacts of Military Courts on Fair Trail**

Military Courts have adversely affected the Fundamental Right to have fair trial by an autonomous, unbiased, and competent court irrespective of the nature and magnitude of the alleged crime. *Geoffrey Robertson* denied the existence of Military Courts in strict sense.<sup>334</sup> The Protection of Pakistan Act 2104 was aimed to extend the authority of military and police officials in certain specified offences. This Act allows detention of an accused for 90 days, which is contrary to the prevailing law in Pakistan. This Act is in contrast with the general principle of law that an accused is considered innocent unless proved guilty and where prosecution is responsible to prove its case beyond any shadow of reasonable doubt. Contrary to the general principles of law, any person arrested under this Act is considered guilty unless he proves himself innocent. Furthermore, trial of an accused by a special judge in a special court without complying with the prerequisites of fair trial is against the spirit of Article 10-A of the Constitution of Pakistan, 1973.

##### **3.4.5.1. Incompatibility with International and Domestic Standards**

The laws whereby military courts are allowed to trial civilians in Pakistan are not compatible with international standards, which ensure a fair trial by impartial and autonomous courts. These international standards have been derived from various

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<sup>334</sup> Robertson, Geoffrey. *Crimes against humanity: The struggle for global justice*. (The New Press, 2013).

sources: firstly, the international treaties such as ICCPR<sup>335</sup>, to which Pakistan is a signatory, provide fair trial procedure. Article 14<sup>336</sup> allows individuals to a fair and public trial, which is applicable to all courts including Military Courts.<sup>337</sup> The Human Rights Committee of the UN has also stressed on avoiding civilian trial in Military Courts due to rising concerns about the lack of fair and impartial administration of justice.<sup>338</sup>

Secondly, Draft Principles<sup>339</sup> confines Military court's jurisdiction to its personnel only and confers right to fair trial of the civilians by an impartial civilian court. Thirdly, there are regional human rights treaties<sup>340</sup> prohibiting civilian trial by Military Courts.<sup>341</sup> Exceptionally, the European Court of Human Rights allows civilian trial by military courts with the assurance of maximum standards of fair trial.<sup>342</sup>

In Pakistan, Military Courts are not fully independent and impartial and do not meet the indigenous and international standards of fair trial. Similarly, there are some prerequisites for judicial competence and independence and Military Courts do not comply with those requirements: the judges of Military Courts are not independent from military hierarchy, they have no security of tenure, and they are not required to have legal qualification, legal training, or legal wisdom. Justice also demands public

<sup>335</sup> Assembly, UN General. "International covenant on civil and political rights." *United Nations, Treaty Series* 999 (1966): 171.

<sup>336</sup> Article 14, Assembly, UN General. "International covenant on civil and political rights." *United Nations, Treaty Series* 999 (1966): 171.

<sup>337</sup> Human Rights Committee, *General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial*, UN Doc. CCPR/C/GC/32, 23 August 2007, para. 6, 2007.

<sup>338</sup> Human Rights Committee, *Concluding Observations: Slovakia*, UN Doc. CCPR/C/79/Add.79 (1997) para20; Lebanon, UN Doc. CCPR/C/79/Add.78 (1997) para 14; Chile, UN Doc. CCPR/C/CHL/CO/5 (2007) para 12; Tajikistan, UN Doc. CCPR/ CO/84/ TJK (2004) para 18.

<sup>339</sup> Draft Principles Governing the Administration of Justice Through Military Tribunals, U.N. Doc. E/CN.4/2006/58 at 4, 2006.

<sup>340</sup> The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR); The American Convention on Human Rights; The Inter-American Court of Human Rights. The African Charter on Human and People's Rights, The African Commission on Human and People's Rights.

<sup>341</sup> Ibid.

<sup>342</sup> Fair Trial Manual (Second ed.), Amnesty International, 2014, pp. 224-226.

trial except certain exceptional circumstances that allow in-camera hearing. The Army Act does not allow public trial and the government, through an amendment, allowed Military Courts to conduct in-camera trial.<sup>343</sup>

Similarly, the Army Act bars appellate jurisdiction of the superior courts over decisions of military courts. In recent cases<sup>344</sup>, the Supreme Court highlighted that the Superior Courts can assume jurisdiction over the decisions of military in the existence of any of the three situations: an act without jurisdiction, *mala fide*, or *corum non judice*. The international standards, however, confine Military Courts' authority to ruling in the first instance and appeals are tickled by the civilian courts.<sup>345</sup> Moreover, Military Appellate Courts, which are comprised of officials without any legal education and legal wisdom, do not comply with the international standards.

Likewise, judgments of Military Courts are not complied with the domestic as well as international standards as they lack detailed reasoned judgments. In 2012, the Supreme Court directed Parliament to modify the Army Act, in order to meet, at least, the minimum standards, ensuring fair trial and to make decisions accessible to general public. Nevertheless, these directions are not yet implemented. So far as death penalty is concerned, military courts are empowered to impose death sentences. However, the imposition of death sentence without complying with the minimum standards of fair trial set forth under Article 9 and 14 of the ICCPR is considered to be infringement of the Article 6 of the ICCPR, which ensures right to life.

In Pakistan, more than a dozen petitions have been filed in the Supreme Court challenging the validity of the civilians' trial by Military Courts by virtue of 21<sup>st</sup>

<sup>343</sup> Security for Military Court Judges and Prosecutors, Dawn News, 25 February 2015.

<sup>344</sup> Ex.-Gunner Muhammad Mushtaq and Ex-Lance Naik Mukarram Hussain v. Secretary Ministry of Defense through Chief of Army Staff and others, SCMR 1530 (SC 2014); Ghulam Abbas v. Federation of Pakistani through Secretary Ministry of Defense, SCMR 849 (SC 2014).

<sup>345</sup> Principles 17 of the Draft Principles Governing the Administration of Justice through Military Tribunal, UN Doc. E/CN.4/2006/58.

Constitutional Amendment and Amendments to the Army Act. The petitioner contended that these amendments not only violate right to fair trial and judicial autonomy but also are contrary to the trichotomy of powers protected and recognized by the Constitution of Pakistan, 1973. Previously, the Court has declared the establishment of these military courts unconstitutional and observed that Military Courts had not provided any mechanism for invoking Appellate Jurisdiction of the Superior Courts. The establishment of Military Courts, without subordination to the Supreme Court, amounts to a parallel judicial system, which is contrary to the existing judicial mechanism established by the Constitution. The Court further observed that divergence from the principles of trichotomy and standards of fair trial shall not be compromised on the touchstone of the doctrine of state necessity.<sup>346</sup>

In South Asia, Pakistan is an exceptional country that allows civilians' trial through Military Courts. Unlike Pakistan, the rest of the region is making arrangements for Military Courts in order to ensure fair trial and to make procedure of these courts identical to the procedure followed by regular courts.<sup>347</sup> Keeping in view the above arguments for the justification of military courts and their implications, it can be concluded that Pakistan has been facing so many challenges including terrorism and law and order situation. The civilian government, time to time, allowed Military Courts to try civilians for alleged heinous crimes leading to terrorism. Recently, the government, by virtue of 21<sup>st</sup> Constitutional Amendment established Military Courts to speedily try the civilian suspects of terrorist activities. Considering the integrity and security of the country, Military Courts were allowed to function for two years. These courts, however, remained short of fair trial procedure and could not comply with the international and indigenous standards of fair trial procedure.

<sup>346</sup> *Liaquat Hussain and Others v. Federation of Pakistan*, PLD 504 (SC 1999).

<sup>347</sup> Pakistan: Military Trials for Civilians Questions and Answers. International Commission of Jurists (April 2015): 16-17.

Further, these courts were administered by officials without having legal qualification and expertise.

Despite the government's commitments to bring reforms to the civilian judiciary, the government extended Military Courts for a further period of two years. The constitutional arrangements whereby Military Courts were allowed to perform functions have also ousted appellate jurisdiction of civilian courts, including the Superior Courts. The impugned decision of the Appellate Military Tribunal gets final authority and can be challenged only on the grounds of jurisdictional defects, mala fide, or corum non judice. The introduction of this parallel judicial system is adversely affecting the government's tripartite system and judicial autonomy. In order to repose trust in civilian judiciary, the government should bring about reforms in judicial system. The government should also make arrangements for the security of civilian judges, prosecutors, and witnesses of the terrorism suspect cases. Moreover, the Military Courts should be brought into the purview of civilian judiciary. An individual, whose trial has been concluded by Military Courts, should have a legal right to challenge the impugned order in the civilian courts. The military courts should be administered by officials having legal qualification and expertise, who could provide legal reasoning to their decisions so as to make sure that justice is not only done but manifestly seen to have been done.

### **3.5. CRITICAL APPRECIATION**

To conclude, the doctrine of separation of powers prevents concentration of powers in one authority that leads to the exploitation of powers and tyranny as warned by Acton's dictum: power tends to corrupt and absolute power corrupts absolutely. Keeping in view potential misuse of powers, the democratic systems distribute state

authority into three organs: the legislature, the judiciary, and the executive. This concept was originated in the USA. The application of this doctrine has not been efficiently worked in Pakistan. The executive branch of the state enjoyed authoritative control in both Presidential as well as Parliamentary form of governments. In both the civilian and military rules, the decision-making authority is concentrated in the hands of one person. The trichotomy of powers envisaged by the Constitution of Pakistan has failed to work in letter and spirit.

Despite the fact that Pakistan's founding father declared parliamentary form of government; the executive power has either been vested in the office of the head of the state or government. The Constitution of Pakistan, 1973 and 13<sup>th</sup>, 14<sup>th</sup>, and 18<sup>th</sup> Amendments to the Constitution vested the executive authority in the Prime Minister. Nevertheless, the executive authority has been shifted to the president by virtue of 8<sup>th</sup> and 17<sup>th</sup> Amendments. This oscillation of the executive authority between the parliamentary and presidential form of government has further obscured the conceptualization of separation of powers. Generally speaking, a parliamentary form of government which is headed by the prime minister, the executive is formed by the Prime Minister and his Cabinet. Nevertheless, a parliamentary form of government, having a presidential chief executive, undermines the legislature's ability to keep surveillance on the executive.

For more than three decades, Pakistan had been directly ruled by Military. The civilian governments failed to govern firmly and honestly in their respective tenures. Additionally, the legislature and the judiciary were no more than rubber-stamps for most of Pakistan's history. Likewise, the provincial autonomy provided by the Constitution, which upholds a federation, had never been actively realized and enforced in Pakistan that consequently led to discontent in the federating units. A

significant cause that contributed in the secession of East Pakistan's wing was considered to be deprivation of its people's due share in government and economics resources. The ruling elites had never paid considerable attention to the implementation of the provincial autonomy in its spirit even after the tragic loss of Pakistan's eastern wing. Autocratic systems of federalism could be reflected well in the former Soviet Union and the Federal Republic of Yugoslavia. The downfall of the federation in the latter was significantly due to the lack of democratic norms in its federation.<sup>348</sup>

Pakistan's history is evident of short periods of civilian rule after very long periods of military's rule. The civilian rulers have shown autocratic tendencies as opponent of a tyrant is the outcome of the despotic regime it has succeeded from such tyrant.<sup>349</sup> After getting authority, such opposition to the dictator cannot automatically become democratic. Liberalization does not itself lead to democracy rather there are various considerations for the democratization: regular, transparent elections, and political leadership's accountability. In Pakistan's perspective, ensuring parliamentary form of government, there is need of active and sustainable mechanism for the distribution of the governmental authority, where each organ is fully capable of exercising sovereign authority in its jurisdictional sphere, with a reasonable control from the other state organs, in order to avoid potential exploitation of authority and unnecessary emergence of the executive powers.

The underlying objective of separation of powers is to foster institutional surveillance, which ultimately helps overcome potential abuse of authority. Lack of its institutionalization creates prospects of tyranny either in the shape of traditional

<sup>348</sup> Sultana, Tasneem. "Montesquieu's doctrine of separation of powers: A case study of Pakistan." *Journal of European Studies* 25, no. 2 (2012): 71.

<sup>349</sup> Rada, Peter. "The Rubik's Cube of Democracy." *Pakistan Journal of International Relations* 2, no. 1 (2010): 103.

dictatorship, military rule, or authoritarianism in the guise of democratic rule. In Pakistan, there are a number of precedents where the decision-making authority has been in the hands of one person both in the civilian as well as in the military regimes. In the like circumstances, the authority has been exploited and the power grabbed by the executive could not be hindered. This tendency continued because the authority has traditionally been concentrated and the mechanism of checks and balances, which could serve as a safeguard against misuse of authority, could not be asserted in various cases.

It is high time to learn from the past experiences. The developing democracies are passing through a transition of democratic journey. Rationalizing the concept of separation of powers in Pakistan's perspective, where the Constitution envisages trichotomy of powers, is worth-considering. Like other constitutional democracies, in Pakistan, governmental authority is distributed among the state organs for ensuring optimum sovereignty and reasonable control against each other to avoid misuse of authority. Similarly, in constitutional democracies, a mechanism of checks and balances is inherently implicit. Judiciary is empowered to exercise checks on Parliament, in order to review laws and declare those laws null and void if those are conflicting with the Constitution, serves as a basic check on any potential misuse of government's authority.

In the past, judiciary was reluctant to exercise its power of review. Nonetheless, with the appreciation of judicial activism, judiciary is increasingly exercising this privilege. Likewise, judiciary is authorized to keep control on the executive. Moreover, some of the judicial checks in the form of *suo motu* on the executive actions are considered controversial. The recent trend towards judicial autonomy is a positive step with reference to institutionalization of checks and

balances, provided that judicial impediments should not transcend into judicial imperialism. Application of two considerations must be ensured in order to fully realize its impacts in a sustainable manner: de-politicization of the superior judiciary and elimination of graft at all levels by introducing judicial reforms. In order to institutionalize a system of checks and balances among three governmental branches, two key instrument need to be reshaped: constitutional reforms, clearly elaborating each branch's jurisdictional sphere and reforms in the accountability mechanism.

## **Chapter No. 04**

### **ROLE OF JUDICIARY IN STABILIZING AND DESTABILIZING OF THE DEMOCRATIC INSTITUTIONS**

Since Pakistan's inception, judiciary played a very critical role in the constitutional and democratic transition. Generally speaking, judiciary plays an incredible role in the democratization process. In Pakistan, judiciary, however, has been credited for validation of the extraconstitutional actions, military takeovers, and supporting the dictatorial regimes' entrenched authority at the expense of the representative institutions, and its own autonomy and credibility. This chapter examines leading historical cases, which divides role of the judiciary into two categories: cases advancing the democratic process and cases retarding the democratic development. Another aspect of this chapter highlights role of judiciary towards different institutions and political parties, how judiciary had supported one institution and political party against the interest of the other institution and political party.

This Chapter presents evidence that why there is a constant need of judicial intervention, as new forms of corruption spread like wildfire that necessitates judiciary to intervene, in order to rescue failure of the state and to ensure that the country as a whole continue as a viable entity. This section also investigates that how judicial activism and superior court's tendency towards *suo motu* actions is reducing functional space for the executive, which is by itself contrary to the functionalist approach of the concept of separation of powers and checks and balances. Last segment of this chapter elucidates that how the two-edged weapon of judiciary can be streamlined in order to guarantee proper functioning of the other state organs without deviating from prime function of its own, to review actions of the other state organs for their compliance with the Constitution.

## 4.1. EVOLUTION OF DEMOCRACY IN PAKISTAN: A JUDICIAL CASE REVIEW

In Pakistan, judiciary significantly contributed in shaping, promoting, and upholding democracy and Constitution. However, for numerous reasons judiciary has not been able to direct the state for upholding rule of law and democratic norms: fragile tendency towards constitutionalism, judiciary's dependence on other state organs for its institutional development and enforcement of its judgments, and lack of enduring judicial-autonomy from other state-actors and institutions. As evident from legal and political history of Pakistan, whatever autonomy judiciary has achieved is more likely due to changes witnessed in the democratic transition, rather than its own struggle for independence.

### 4.1.1. Cases where Judiciary Endorsed Extra-Constitutional Steps

In *Federation of Pakistan v. Moulvi Tameez-ud-Din*<sup>350</sup>, the Governor General, *Gulam Muhammad* dissolved the Constituent Assembly, presided by Moulvi Tameez-ud-Din who was serving as Speaker, challenged that impugned order before the Sindh Chief Court. The Court decided the case in petitioner's favor. On Appeal, however, it turned over against the petitioner and decided in the appellant's favour by validation of dissolution of the Constituent Assembly. For the first time, the Court introduced the necessity doctrine and relied on *Bracon's maxim*, which is otherwise unlawful can be made lawful by necessity.

On October 24<sup>th</sup>, 1954, the Governor General dissolved the Assembly, which was assigned with the task of drafting the first Constitution of Pakistan, on the pretext that the state affairs cannot be carried out in accordance with the spirit of the

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<sup>350</sup> *Federation of Pakistan v. Moulvi Tameez-ud-Din*, PLD 240 (FC 1955).

Constitution. The Governor General directed that till fresh elections the country's administration shall be carried on by the re-constituted Cabinet.<sup>351</sup> The alleged proclamation order was challenged on the grounds of an act without jurisdiction, illegal, void, and ineffective. Two Writ Petitions were filed in the Chief Court of Sindh; firstly, writ of *Mandamus* or any other appropriate writ restraining the respondents from the enforcement of the proclamation order. Secondly, writ of *Quo Warranto* was filed whereby the respondents' authority of claiming to be members of the Council of Ministers was challenged.<sup>352</sup>

The Federal Court, headed by Justice *Manir*, with the dissenting opinion of Justice *A.R. Cornelius*, reversed the Chief Court's decision and observed that Section 223-A of the Government of India Act, 1935, on the basis of which the Sindh Chief Court issued the writs has not yet become law for it has not yet received Governor's assent. Further, the respondents' appointments as Ministers neither caused any personal injury to the petitioner nor adversely affected his interest. The petition for *Quo Warranto* was, therefore, not maintainable. The power to dissolve assembly is the Crown's prerogative vested in the Governor General by virtue of Section 5 of the Independence Act, 1947.

The Federal Court validated the dissolution order in view of the following seven grounds: Firstly, Pakistan being dominion of the British Crown, the legislature had been vested with the authority to dissolve the Assembly unless that authority had been superseded or regulated by legislation. Secondly, it was the prerogative of the Crown to dissolve the Constituent Assembly, which could be taken away only by an Act of the British Parliament or a law passed under Section 8 of the Indian Independence Act. The petitioner had not claimed that any such law has been passed.

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<sup>351</sup> *Ibid.* p. 96.

<sup>352</sup> *Ibid.* p. 96.

Thirdly, the Governor General represented the Crown with all such powers by virtue of Section 5 of the Independence Act. Fourthly, the petitioner referred to and relied on the Rule 15 of the Constituent Assembly, which provided that the Assembly could only be dissolved by a two-third majority. The respondents, however, claimed that the Rules of Procedure was not a law for two reasons: the Rules were beyond the powers conferred on the Assembly and lack of Governor General's assent.<sup>351</sup>

Fifthly, the Constituent Assembly of Pakistan was established under the authority of the Governor General of India. The Governor General of Pakistan was authorized by the Section 19(3) of the Independence Act to revoke or vary orders of the Governor General of India and to make further orders. Sixthly, the respondents denied the power to dissolve the Assembly, conferred on the Governor General of India, from the Governor General of Pakistan, under Section 5 of the Independence Act. Seventhly, the proclamation order of October 24<sup>th</sup> 1954 was within the authority of the Governor General. For establishment of the validation of the order, the respondents presented various grounds: the constitutional machinery has been broken down; the constituent assembly has lost public confidence, and had failed to perform its functions in accordance with the provisions of the Indian Independence Act, 1947.

The Federal Court's decision about Governor General's consent regarding the Constituent Assembly's legislation marked the foundation for constitutional and political crisis in Pakistan. The decision also invalidated forty-six Acts passed by the Constituent Assembly, from its establishment till dissolution, without formal consent of the Governor General. In response, these constitutional crises were further deteriorated with the Emergency Power Ordinance (IX of 1955) whereby the Governor General was authorized to legalize selective laws passed by the Constituent

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<sup>351</sup> Ibid. p. 240.

Assembly with retrospective effect. Interestingly, the same bench of the Federal Court invalidated the Emergency Powers Ordinance (IX of 1955) in subsequent case.

In *Usif Patel and Others v. the Crown*<sup>354</sup>, the District Court of Larkana convicted the appellants under the Goondas Act<sup>355</sup>. The appellants filed an appeal against the impugned order in the Sindh Chief Court under Section 491 of the Cr. P.C. The Court while rejecting the appeal held that the Governor General Act under which action was taken against them was not ultra vires and their detentions under the said Act were legal.<sup>356</sup> On appeal from the Chief Court, The Court declared that the dominion-Governor General not competent to issue an ordinance on constitutional matters, hence Emergency Power Ordinance (IX 1955) was invalid. The validity of Section 92-A of the Government of India Act, 1935 was the main issue before the Federal Court. It was alleged that the insertion of any provision, without the consent of the Governor General, to the Government of India Act, 1935 Act was invalid and alleged that appellants' detention under such law was invalid. The Court held that the appellants' detention is unlawful. The Court further observed that the Governor General was not authorized to substitute the Constituent assembly. The Court directed for the formation of another representative body, in order to validate invalid legislation.<sup>357</sup>

The Court also laid down that any legislative provision that relates to a constitutional matter is solely within the powers of the Constituent Assembly and the Governor General is thereby precluded from exercising those powers. The Court observed that the Indian Independence Act, 1947, whereby Governor General's authority was extended in the constitutional making, was itself never been validated.

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<sup>354</sup> *Usif Patel and Others v. the Crown*, PLD 387 (PC 1955).

<sup>355</sup> Governor's Act, XXVIII of 1952.

<sup>356</sup> *Ibid.*

<sup>357</sup> Khalid, Iram. "Role of Judiciary in the Evolution of Democracy in Pakistan." *Journal of Political Studies* 19, no. 2 (2012): 128.

So, the revision of the Government of India Act, 1935 in pursuant to this Act was also invalid. In response, the Governor General issued another proclamation assuming all necessary powers.<sup>358</sup> The country continued to experience despotic regime in its pre-constitutional period.

The Governor General sent a reference to the Court for seeking an advisory opinion.<sup>359</sup> The Court declared that the emergency powers exercised by the Governor General were ultra vires. The Court reiterated the necessity doctrine as a constitutional justification for his wide-ranged powers. The doctrine deemed that where an unavoidable situation created the Governor General had the authority to dismiss the assembly.<sup>360</sup> The Court permitted him to continue with extraconstitutional authority, in order to give effects and to validate the laws retrospectively, until its legality has been decided by the newly reconstituted assembly.<sup>361</sup> The Court, however, declared that the Governor General cannot issue an ordinance on constitutional matters. Both these cases left a major impact on the democratic culture, shook the entire political and administrative set-up of the state to its very foundation. The superior judiciary embarked on an aberrant jurisprudence for Pakistan's legal scholarship.

In *State v. Dosso and other*<sup>362</sup> the respondents were convicted by the Deputy Commissioner for murder under Section 11 of the Frontier Crime Regulations, 1901 (FCR) and were referred to the Council of Elders, *Special Jirga*, which founded the responded guilty. The representatives of the respondents filed writ petitions of *Habeas Corpus* and *Certiorari* at the High Court. It was alleged that the provisions of the

<sup>358</sup> Newberg, Paula R. *Judging the state: courts and constitutional politics in Pakistan*. Vol. 59. (Cambridge University Press. 2002): 51-52.

<sup>359</sup> Reference by the Governor General, PLD 435 (FC 1955).

<sup>360</sup> Chak, Farhan Mujahid. *Islam and Pakistan's Political Culture*. Vol. 33. (Routledge, 2015): 118.

<sup>361</sup> Shabbir, Syeda Saima. "Judicial Activism Shaping the Future of Pakistan." (2013): 7.

<sup>362</sup> State v. Dosso, PLD 533 (SC 1958).

FCR, enabling the executive authorities for referring criminal cases of a particular sect of the society to council of elders, were repugnant to the Constitution<sup>363</sup>: Article 5, which declared the equality of law and equal protection of law and Article 7, which gave right of legal representation, hence void by virtue of Article 4, which dealt with right of individuals to be dealt with in accordance with law. The Court while accepting the contention set aside the conviction.<sup>364</sup>

On October 7<sup>th</sup>, 1958 the President, *Iskander Mirza*, declared Martial Law and thereby annulled the Constitution, ousted jurisdiction of the Superior Courts, dissolved the Federal and Provincial Cabinets and Assemblies, and appointed the Commander-in-Chief, *Ayub Khan*, as the Chief Martial Law Administrator. The President issued the Law Continuance in Force Order, 1958, which validated laws other than the Constitution and restored courts' jurisdiction. Four Appeals of the same nature were brought before the Apex Court. In order to check validity of the writs issued by the High Court in respect of the order of reference to the council of elders or convictions under Section 11 of the FCR on the ground of Article 5 of the Constitution.<sup>365</sup>

The Court held that according to the new legal order, Article 5 of the Constitution had lost its effectiveness. Nevertheless, the FCR was still effective and the references made to the council of elders and the subsequent proceedings thereof were good. The Court while validating martial law applied the same test of state necessity and observed that a victorious revolution is internationally recognized legal instrument for changing a constitutional order. For its validity, the existing legal order must comply and adhere to the new order. The Court further observed that even

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<sup>363</sup> The Constitution of Pakistan, 1956.

<sup>364</sup> State v. Doso, PLD 533 (SC 1958).

<sup>365</sup> *Ibid.*

jurisdiction and functions of the courts remained subject to the new constitutional order.<sup>366</sup>

The President, *Iskander Mirza*, was deposed by Ayub Khan who introduced the concept of *Basic Democracy*, which could not be accepted as a substitute for the assemblies. That system, however, initiated the concept of concentration of powers in one person, which was contrary to the principles of democratization. Had judiciary resisted the first military intervention, the situation would have been different.<sup>367</sup> Judiciary validation to the extraconstitutional actions must have been motivated by various elements: external pressure from military and its affiliates, fragile civilian government to stand with judiciary, and survival of judiciary as an institution as well as of its judges in their individual capacity.

In *Begum Nusrat Bhutto v. Chief of the Army Staff and Federation of Pakistan*<sup>368</sup> the Court once again validated the military coup on ground of state necessity. On July 5<sup>th</sup>, 1977, General Zia-ul-Haq proclaimed Martial Law and became the Chief Martial Law Administrator, removed the PPP government, suspended the Constitution, dissolved the Assemblies, and charge of acting governor of the provinces were entrusted in the Chief Justices of the respective Provinces. The president was permitted to continue as nominal head of the state. Mr. Zulfiqar Ali Bhutto along with ten other leaders of the PPP were arrested and detained in various prisons in different Provinces of Pakistan. The petitioner filed petition in the Supreme Court and contended that the Chief of Army Staff leveled unfair allegations against the PPP government, in order to justify PPP leadership detention and intention to prosecute them before Military Courts or Tribunals to ensure public accountability.

<sup>366</sup> Khan, Hamid. *Constitutional and political history of Pakistan*. (Oxford University Press, USA, 2005).

<sup>367</sup> Khalid, Iram. "Role of Judiciary in the Evolution of Democracy in Pakistan." *Journal of Political Studies* 19, no. 2 (2012): 129-130.

<sup>368</sup> *Begum Nusrat Bhutto v. Chief of Army Staff and Federation of Pakistan*, PLD 657 (SC 1977).

The Petitioner challenged the proclamation of Martial Law and detention of the PPP leadership on various legal and constitutional grounds. The petitioner alleged that the detentions were based on *mala fide* coupled with the ulterior motive to prevent the PPP from effectively participating in the anticipated elections of October 1977. On the ground of non-maintainability, the Court dismissed the petition. The Court while legalizing Martial Law observed that the government was unable to maintain law and order situation and political crisis led to constitutional breakdown. The Chief of Army Staff intervened for the state's integrity, in order to rescue the country from bloodshed and chaos and was justified to suspend fundamental rights of the citizens. Further, the Court gave directions for making arrangements so as to ensure fair elections.<sup>369</sup>

This case turned out military coup for more than a decade at the expense of the fragile democracy. Once again the army availed the opportunity resulted from the executive malfunctioning, which was endorsed and validated by judiciary. In most of the cases, the incapacity or despotic and autocratic executive created opportunity for military takeovers. Military directly and indirectly influenced judiciary: the judges' appointments and all other incentives were made by the President, being head of the executive, who remained influenced by Military. This is how military not only legalized its direct rule but also entrenched its authority in the civilian governments, which was reflected in the judicial decisions.

In *Ahmad Tariq v. Federation of Pakistan*<sup>370</sup> on August 6<sup>th</sup>, 1990, the President, in exercise of his authority under Article 58 (2) (b), dissolved the Assembly on the pretext that the government affairs could not be carried as per spirit of the Constitution so an appeal to the electorate was indispensable. The petitioner

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<sup>369</sup> Ibid.

<sup>370</sup> *Ahmad Tariq v. Federation of Pakistan*, PLD 646 (SC 1992).

challenged the impugned order in the Lahore High Court. The Court while dismissing the petition held that the President was justified in forming the opinion to dissolve National Assembly. On Appeal, the petitioner contended that the impugned order cannot be sustained in the light of the principles elucidated by the Court<sup>77</sup> that dissolution of the National Assembly can be justified only where there is an actual constitutional breakdown. In the instant case, there was no constitutional breakdown and the President could resort to alternative powers instead of taking such drastic step of dissolving the Assembly.

The Court dismissed the petition with response to the various objections raised by the petitioner: firstly, with reference to the alternative powers the Court declared that the President's authority for the exercise of the alternative powers is subject to the Prime Minister's advice. The President, however, cannot act entirely at his own discretion in this regard. Secondly, the argument that the National Assembly is directly elected by the people of Pakistan, its dissolution should not be left at the mercy of the President. The Court held that the Constitution expressly authorizes the President to exercise his power to dissolve the National Assembly. Fourthly, the petitioner objected various grounds such as horse-trading, corruption, nepotism, and violation of individual constitutional provisions continued to be taking place even after the impugned action. The Court held that identification of an evil is followed by remedial and corrective measure. Fourthly, the petitioner objected that the dissolution, being an extreme authority, should only be exercised in exceptional circumstances of actual breakdown of the constitutional machinery. Nevertheless, the same should not be exercised in the absence or failure to observe a particular constitutional provision, which is different from the constitutional breakdown. The Court held that the order of

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<sup>77</sup> Federation of Pakistan v. Muhammad Saifullah Khan, PLD 166 (SC 1989).

dissolving assemblies may rightly be exercised when a country is governed by an extraconstitutional mean as opposed to the constitutional order.

In *Seyed Zafar Ali Shah and others v. General Pervez Musharraf*<sup>372</sup> the Court legalized the Provisional Constitutional Order of 1999, whereby General Pervez Musharraf proclaimed emergency and the Oath Order<sup>373</sup>. The Court, however, limited the scope of the regime, required to conduct the elections within three years. In this case, the Court addressed various legal and constitutional issues: firstly, the country was facing a situation where military intervention became inevitable. This military intervention is validated on the touchstone of necessity doctrine, which is recognized not only in Islam but also in other religions, and the same has also been recognized by prominent international jurists such as *Hugo Grotius*, *Chitty*, and *De Smith*.<sup>374</sup>

Secondly, the federal government provided sufficient material in support of military intervention through extraconstitutional arrangements. These materials are very relevant and admissible for justification of the intervention. Thirdly, all the executive actions, which were indispensable for running the state affairs and public welfare, were declared valid. Fourthly, The Constitution of Pakistan, 1973 remained the highest and ultimate law of the land. Nevertheless, some parts of the Constitution held in abeyance on the basis of state necessity. Fifthly, judiciary has to carry on its functioning under the Constitution and the same position has not been derogated by the judges' oath to the Oath Order<sup>375</sup>. Sixthly, previous order of emergency of May 1998 was proclaimed by virtue of Article 232(1). However, the present emergency of

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<sup>372</sup> *Seyed Zafar Ali Shah and others v. General Pervez Musharraf*, PLD 869 (SC 2000).

<sup>373</sup> The Oath of Office (Judges) Order 2000.

<sup>374</sup> *Virk, Muhammad Nasrullah*, "Doctrine of Necessity Application in Pakistan," (2012); 86.

<sup>375</sup> The Office (Judges) Order No. 1 of 2000

October 1999 was imposed through an extraconstitutional step, followed by the Military takeover, stood valid though the previous emergency was still intact.<sup>376</sup>

Seventhly, the judges of the superior judiciary who either refused to take oath under the Oath Order or to whom the oath has not been given, are hit by 'past and closed transaction' doctrine, hence cannot be reappointed. Eighthly, the government should advance the accountability mechanism to ensure transparency and to further make sure that even the superior courts' judges are not above the law and the Constitution. They are also subject to accountability as envisaged by Article 209 of the Constitution. Ninthly, removal of *Musharraf* without observing principle of natural justice was *ab initio void*, having no legal effects. Tenthly, the Chief Executive shall hold election within three years and the Court has the authority to review the continuation of emergency of October 1999 at any subsequent stage.<sup>377</sup>

In *Tika Iqbal Muhammad Khan v. General Pervez Musharraf*<sup>378</sup>, petition was filed against the imposition of emergency, the PCO Order of 2007, and the Oath Order, 2007. The responded contested the petition on various grounds: firstly, Pakistan has evident extreme terrorism created a phenomenon of a state within a state, which adversely affected the economic growth. The government could not succeed in curbing terrorism. The President was informed by the Prime Minister about the sensitivity of the situation vide letter dated November 3<sup>rd</sup>, 2007. Secondly, the Constitution of Pakistan envisaged the concept and underlying principles of trichotomy of powers, where every state organ is required to perform its function within its jurisdictional sphere. Nevertheless, some of the members of judiciary transgressed the constitutional limits, on the pretext of judicial activism, bypassed the

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<sup>376</sup> Ibid.

<sup>377</sup> Ibid. 86-89.

<sup>378</sup> *Tika Iqbal Muhammad Khan v. General Pervez Musharraf*, Constitution Petition Nos.87 and 88 of 2007, C.P.No.87/07.

well-established principle of judicial restraint. The Court addressed individuals' grievances under Article 184(3), in the matters pertaining fundamental rights of public importance. The enhancing scope of *suo motu* actions has paralyzed the state machinery, which has left adverse effects on both the executive and the legislative functioning.

The whole situation led to some unavoidable circumstances where governing state affairs, according to the spirit of the Constitution, was not possible. Further, there was apprehension of disastrous consequences had the proclamation of emergency was not declared. The situation that led to the imposition of emergency was identical to that of July 5<sup>th</sup> 1977 and October 12<sup>th</sup> 1999, which had been validated by the Court<sup>379</sup> in the largest state interest and public welfare. Further, the Constitution is not abrogated rather held in abeyance.

The Supreme Court, constituted under the PCO Order of 2007, justified the extraconstitutional measure of the Army Chief and the President. The Court held that the Constitution remains the highest law of the land, in spite of the fact that some of the Constitutional provisions are held in abeyance considering common interest of people. The Court validated the extraconstitutional steps of imposition of emergency of November 3<sup>rd</sup>, 2007, the PCO Order No. 1 of 2007, and the Oath Order of 2007 subject the governing of the country according to the Constitution. The Court also validated all previous actions which have been taken for smooth working of state affairs and welfare of the people. The Court also permitted amendment to the Constitution with the exceptions of its basic features such as Islamic provisions, judicial autonomy, parliamentary government, and federalism. The Court further

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<sup>379</sup> Begum Nusrat Bhutto v. Chief of the Army Staff, PLD 657(SC 1977); Syed Zafar Ali Shah v. Pervez Musharraf, Chief Executive of Pakistan PLD 869(SC 2000).

directed to make every possible arrangement, as per the requirements of the Constitution and law, in order to ensure fair and transparent elections.<sup>380</sup>

The Courts confirmed judicial review by the superior courts, in order to check validity of the actions of the President and the Army Chief irrespective of jurisdictional bar imposed by virtue of the extraconstitutional measures. The Court also declared that the superior judiciary is accountable only to the Supreme Judicial Council under Article 209. The Court also barred re-appointment of the judges who could not take oath under the Oath Order, 2007. The Court directed the Army Chief/President to revoke the emergency at the earliest so that the period of constitutional deviation may be ended. Nevertheless, the Court preserved the authority of re-examining the continuation of emergency at any subsequent stage if so required. Even though, Court declared acts of the Army Chief extraconstitutional, yet the court validated all his actions on the same conventional grounds, which derailed the democracy unless the same was invalidated by the Court<sup>381</sup>.

In the above-mentioned cases, the Superior Courts validated extraconstitutional actions of the military regimes at the expense of the civilian rule. However, military entrenchment never remained absolute and judiciary by an evolutionary process not only restraint the despotic regime to hold elections within the stipulated time, but also reinforced the democratic institutions, ensured its autonomy from military and its affiliates, and ensured its surveillance on the other state organs, in order to uphold the Constitution.

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<sup>380</sup> Ibid.

<sup>381</sup> Sindh High Court Bar Association v. Federation of Pakistan, PLD 879 (SC 2009).

#### 4.1.2. Cases where Judiciary Reinforced the Democratic Institutions

In *Miss Asma Jilani v. The Government of the Punjab and another*<sup>382</sup>, the Appellant's father, *Malik Gulam Jilani*, was arrested in *Karachi* under Defense of Pakistan Rules, 1971. The Appellant challenged the detention at the Lahore High Court, which was allowed for hearing and notice was served to the government. Nevertheless, a day before the hearing, the impugned order was substituted by another order issued by the Martial Law Administrator Zone "C" in the exercises of authority conferred on him by virtue of Martial Law Regulation No. 8. The government raised objection regarding jurisdiction of the Court due to bar imposed on Courts' jurisdiction by the last Martial Law regime. The High Court while relying on the *Dosso case*<sup>383</sup> gave validity to the Jurisdiction of Courts Order, 1969 and declared that it had no jurisdiction to entertain the petition.<sup>384</sup> The Supreme Court, however, overruled the decision and the proclamation of martial law by *General Yahya Khan* on March 25<sup>th</sup> 1969 was held to be void.

In *Federation of Pakistan v. Muhammad Saifullah Khan*<sup>385</sup> General Zia-ul-Haq dismissed *Junejo's* government on May 29<sup>th</sup>, 1988 and dissolved assemblies under Article 58 (2) (b) on four grounds: firstly, the national assembly was not able to meet the objectives for which it was elected. The Court while replying to this ground held that the President's reason being too wide does not hold the ground. Secondly, law and order situation went so worst created imminent loss to public lives and properties. The Court responded to this argument that the issue of law and order should have been addressed under the emergency powers, provided under part X of the Constitution. Thirdly, there was imminent threat to the lives, dignity, and security

<sup>382</sup> *Miss Asma Jilani v. The Government of the Punjab and another*, PLD 139 (SC 1972).

<sup>383</sup> *State v. Dosso*, PLD 593 (SC 1958).

<sup>384</sup> *Miss Asma Jilani v. The Government of the Punjab and another*, PLD 139 (SC 1972): 42-43.

<sup>385</sup> *Federation of Pakistan v. Muhammad Saifullah Khan*, PLD 166 (SC 1989).

of people. The Court declared this ground to be patently too wide. Fourthly, public morality declined exceptionally. The Court struck down this justification that such general argument changed by generations. The dissolution of assembly could not be validated.

The Court declared that all four grounds given for the justification of dissolution of assemblies were ambiguous, broad, fictional, and could be passed anytime. Further, the Constitution neither envisages dissolution of assemblies at the will nor at the whim, the dissolution order could not be sustained. The Court invalidated the dissolution of assemblies. However, the Court did not restore Junejo to his office and allowed fresh elections to take place.

General Zia had dissolved Junejo's government without appointment of any caretaker Prime Minister. Zia's death deprived Pakistan of the President, the Prime Minister, and the Provincial Assemblies. This state of vacuum continued until Benazir Bhutto took charge of the Prime Minister's office in 1988. *Haji Saifullah Khan* case also raised the issue about the legal status of all governmental actions during that period. The Court declared the inevitability of the Prime Minister's office as its default would have caused alteration of the character of the Constitution to the Presidential system rather than the democratic system.<sup>386</sup>

The Court provided conditions for the justification of dissolution of the government; the president can dissolve National Assembly when the state machinery has completely broken down and the government affairs cannot be carried out according to provisions of the Constitution. In the instant case, these conditions were not satisfied. Additionally, the general elections were scheduled for the next month,

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<sup>386</sup> Azeem, Muhammad. "Law, State and Inequality in Pakistan." (July, 2017): 169.

November 1988, so the Court declared that it would not vitiate the illegal dissolution keeping in view the national interest to continue election process.<sup>387</sup>

In *Muhammad Nawaz Sharif v. the President of Pakistan*<sup>388</sup> the President, *Ghulam Ishaq Khan*, in exercise of his discretion under Article 58 (2) (b) dissolved the Assembly and dismissed the Prime Minister. The petitioner filed a writ petition under Article 184(3). The petitioner contended that the impugned order was based on *mala fide* and passed without lawful authority. The petitioner prayed that the impugned order should be rendered null and void, the functioning of caretaker government should be declared void, the President should be restricted from intervening with the affairs of the government, and no obstacles should be created in smooth functioning of the National Assembly.

The Court held that the dissolution order was not within the exclusive authority of the President, conferred under Article 58 (2) (b). The Court further held that the other enabling powers available to the President have been passed without lawful authority having no legal force. The Court directed for restoration and resuming functioning of the National Assembly, the Cabinet, and the Prime Minister. Unlike the previous cases, the Court not only invalidated the dissolution order but also restored the deposed government.

In *Sindh High Court Bar Association v. Federation of Pakistan*<sup>389</sup> the Court disregarded the necessity doctrine introduced by the superior judiciary in *Tamizzuddin's case*<sup>390</sup> for validation of extraconstitutional actions, in order to justify Military intervention at the expense of the civilian rule. In the instant case, the Court not only invalidated the emergency imposed by General *Perryz Musharraf* on

<sup>387</sup> Yap, Po Jen, and Holning Lau, eds. *Public interest litigation in Asia*. (Routledge, 2010): 141.

<sup>388</sup> Muhammad Nawaz Sharif v. the President of Pakistan, PLD 43 (SC 1993).

<sup>389</sup> Sindh High Court Bar Association v. Federation of Pakistan, PLD 879 (SC 2009).

<sup>390</sup> Federation of Pakistan v. Moulvi Taméez-ud-Din, PLD 240 (PC 1955).

November 3<sup>rd</sup>, 2007, PCO No. 1 of 2007, and Oath Order, 2007, but also quashed various enactments followed by the emergency. On the receipt of the letter regarding national security concerns from the Prime Minister, *Shaukat Aziz*, addressed to the President, General *Pervez Musharraf*, was regarded to have been the basis for imposition of emergency.

The letter highlighted various issues. Despite the government's commitment to uplift economy, improve law and order situation, and to eradicate terrorism, in the last few months, the country faced high security threats where government's writ in some areas was challenged and the militants were getting control thereof. Further, some of judiciary's members were intervening in the governmental policies, leaving adverse effects on the economic development. Even though, the executive actions were open to judicial review, but the executive wisdom or necessity of a policy was purely an executive function that was not open to judicial review. The Constitution entrusted duty on the judges to adjudicate and must neither legislate nor assume the executive authority. Some of the judicial members, however, departed from these norms.

The constant judicial intrusions in the functional sphere of the executive such as economic policy, urban planning, and price control undermined the government's writ. The courts prohibited the intelligence agencies from pursuing terrorists, which increased the incidence of terrorist attacks. The expanding role of *suo motu* actions negated the fundamental of an adversarial system of justice. The courts released a large number of militants, increasing national security threat. On the other hand, the judges have immunity themselves from inquiring into their own conduct and are now beyond accountability. Moreover, the trichotomy of powers, envisaged by the Constitution, has been eroded. Both the economy as well as law and order situation was adversely effected, making the routine government's functioning hard.

The Court held that from the contents of the letter, which was sent to the President not the Army Chief, it cannot be construed that the armed forces were directed to act in aid of the civil power under Article 245 of the Constitution. Hence, *Musharraf's* action of November 3<sup>rd</sup> 2007 could not be justified. Similarly, the Constitution does not empower the president to issue an Oath Order, suspend the Constitution, assume to himself unconstitutional and illegal powers, and to impose upon the country unconstitutional and illegal emergency and PCO No. 1 of 2007. With slight modifications in the *modus operandi*, it was a replica of March 25<sup>th</sup>, 1969, where the President, *Ayub Khan*, through a letter, asked the Commander in Chief, *General Yahya Khan*, to discharge his constitutional duty of restoring law and order situation.

However, the situation got deteriorated due to agitation and riots throughout the country. Consequently, *Yahya Khan* imposed martial law, abrogated the Constitution of 1962 and took himself the governance of the country via PCO of 1969. In *Asma Jilani's* case<sup>391</sup> such assumption of powers was declared illegal and was termed as usurpation. In the instant case, the Court held that the Army Chief, *Pervez Musharraf*, was not authorized to issue emergency and PCO Order on account of letter from the Prime Minister addressed to the President where some important issues were brought to the notice of the latter. If the President wanted to take any action, including proclamation of emergency, the same should have been done in the light of constitutional provisions on emergency.

The Court held that the Prime Minister neither asked the President to take such action nor it was an advice tendered by the former under Article 48. In other cases<sup>392</sup>

<sup>391</sup> *Miss Asma Jilani v. The Government of the Punjab and another*, PLD 139 (SC 1972).

<sup>392</sup> *Begum Nusrat Bhutto v. Chief of Army Staff and Federation of Pakistan*, PLD 657 (SC 1977), *Seyed Zafar Ali Shah and others v. General Pervez Musharraf*, PLD 869 (SC 2000), *Tika Iqbal*

of the similar nature, such actions of the concerned Chief of Army Staff have already been declared as extraconstitutional actions being violative of the Constitution. In light of the above arguments, the Court declared General *Pervez Musharraf*'s actions regarding imposition of emergency, the PCO Order of 2007, and the Oath Order, 2007 were based on *mala fide*, hence, declared unconstitutional, illegal, and *void ab initio*. The Court also nullified the notification issued by the Ministry of Law for the restoration and reappointment of judges who held office under the PCO No. 1 of 2007 and the Oath Order, 2007. The Court also admitted the fact that in the past it had wrongly validated extraconstitutional actions of military regimes as well as their interventions.

In the above mentioned cases, the Supreme Court of Pakistan not only explicitly invalidated extraconstitutional actions of the despotic regime, but gradually circumscribed the dictatorial elements: the court regarded the conditions for the imposition of the emergency to be wide, vague, and immaterial. The Court presented necessary conditions for the imposition of the emergency: the President can impose the emergency order where the state machinery is completely broken and government affairs cannot be carried out according to the provisions of the Constitution. Initially, the Court only invalidated the dissolution order without restoration of the deposed government. Later on, the Court transformed its authority to the extent that the Court not only invalidated the dissolution order, but also restored the deposed government.

#### **4.2. JUDICIAL ACTIVISM, SELECTIVISM, AND EXECUTIVE'S FUNCTIONAL SPACE: A CRITICAL APPRECIATION**

Judicial activism referred to pro-active functioning of judiciary. Judicial activism is more than its conventional means of resolving disputes in accordance with the constitution or law of the land. It replicates the situation where judiciary goes beyond its conventional role and performs functioning more actively, which otherwise are considered exclusively within the executive or the legislative sphere. Generally speaking, the judicial activism may be referred to invalidation of a duly enacted legislation through court's interference.<sup>393</sup> It is the exercise of disapproving policies of the government officials not clearly proscribed by the Constitution.<sup>394</sup> Judicial activism is also considered as a neologism of judicial review and referred to the superior courts' authority to check constitutionality of a law and of an administrative action.<sup>395</sup>

In Pakistan, the concept of judicial activism got imputes after mini revolution of the restoration of the *de jure* judiciary in 2009.<sup>396</sup> After 2009, judiciary started its functioning more effectively that consequently created debates in legal fraternity. The debates regarding judicial activism could be divided into two broad categories: the opponents and proponents of judicial activism. The opponents of judicial activism argue that judiciary is intruding into the executive sphere thus undermining the democratic transition and thereby the superior judiciary received criticism for being overactive. On the other hand, the proponents of judicial activism argue that judicial

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<sup>393</sup> Jones, Greg. "Proper Judicial Activism." *Regent UL Rev.* 14 (2001): 141, 143.

<sup>394</sup> Kmiec, Keenan D. "The origin and current meanings of judicial activism." *Cal. L. Rev.* 92 (2004): 1463.

<sup>395</sup> Shabbir, Syeda Saima. "Judicial Activism Shaping the Future of Pakistan." (2013): 1.

<sup>396</sup> With the proclamation of emergency of November 3<sup>rd</sup>, 2007, General Pervez Musharraf dysfunctional the superior courts' judges including the Chief Justice of Pakistan, Iftikhar Muhammad Chaudhry, and appointed new judges under the PCO Order, 2007. In 2009, after the restoration of democracy, sparked with the lawyers' movement and agitations throughout the country, the Chief Justice and other members of the superior judiciary got restored to their previous positions and assumed their office.

activism is inevitable for the trichotomy of powers, consolidation of democracy, reinforcement of the democratic institutions, and constitutionalism. This segment examines the test of judicial activism for being a necessary evil: whether the judicial activism creates impediments to the civilian governments and narrows down functional sphere of the executive or it is a tool to keep democracy on the track of evolution, discouraging other state organs from undue interference in the democratic system. This section also examines the situations where the judiciary received criticism for awarding competing judgments in like circumstances, which is referred to as selective justice, selectivism, or favoritism.

The Supreme Court under Article 184(3) invokes its original and *suo motu* jurisdiction on the satisfaction of two main grounds: where matter of common interest is involved and where the alleged matter is concerned with the enforcement of fundamental rights<sup>397</sup>, protected by the Constitution.<sup>398</sup> 'Public importance' is a general term and lack specific definition. Neither the Constitution nor the Supreme Court Rules, 1980 provide an exclusive definition of the term. However, the Courts, in various judgments, elaborated public importance subject to the context and circumstances of each case. Justice *Javed Iqbal* refers public importance to something that belongs to the state, public at large, or to a community as a whole.<sup>399</sup> This ground of public importance created a conflicting discourse among legal fraternity regarding the exercise of original and *suo motu* jurisdiction. The opponents of judicial activism consider that the Supreme Court has widened the scope of Article 184 (3) to the extent that it has created impediments for the executive branch in its functioning.

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<sup>397</sup> Article 8 – 28 of the Constitution of Pakistan, 1973.

<sup>398</sup> Article 184(3) of the Constitution of Pakistan, 1973.

<sup>399</sup> *Pakistan Muslim League v. Federation of Pakistan*, PLD 642 (SC 2007).

In *Miss Benazir Bhutto v. Federation of Pakistan*<sup>400</sup> the petitioner invoked the jurisdiction of the Court on various grounds: constitutionality of the Freedom of Association Order of 1978, the constitutionality of Article 270-A validated by virtue of Eighth Amendment<sup>401</sup> to the Constitution. The petitioner contended that the impugned Amendment is meant to circumscribe the scope and authority of judicial review in various spheres: in the matters related to the enforcement of fundamental rights, including right to form a political party or to become a member thereof. Further, various amendments of the Political Parties Act, 1962 are repugnant to Article 17 and 25 of the Constitution.

The Court elucidated the scope of Article 184 (3) and the authority of judicial review. The Court observed that it shall not confine itself to the ceremonious rules of interpretation rather it shall exercise authority of judicial review to decide according to spirit and objective of constitutional provisions, in order to uphold the democratic values, equality before law, and provide social justice to the people in accordance with the injunctions of Islam. This case paved the avenue for public interest litigation in Pakistan.<sup>402</sup>

Likewise, in *Darshan Masih v. the State*<sup>403</sup> the Court took cognizance, on the receipt of a letter, about bonded labour. The Court declared the matter to be of public importance, violating constitutional provisions<sup>404</sup>. The Court observed that scope of public interest litigation is not limited to the letters of textbooks rather the Court has to consider the facts of each case while devising any scheme of action. In the instant case, the Court also urged for the legislation, in order to define and elaborate forced

<sup>400</sup> *Miss Benazir Bhutto v. Federation of Pakistan*, PLD 416 (SC 1988).

<sup>401</sup> The Constitution (Eighth Amendment) Act, 1985.

<sup>402</sup> Menski, Werner, R. Alam, and Mehreen Raza, *Public Interest in Litigation in Pakistan*. (Platinum, 2000): 44.

<sup>403</sup> *Darshan Masih v. the State*, PLD 513 (SC 1990).

<sup>404</sup> Article 9, 11, 14, 15, 18, and 25 of the Constitution of Pakistan. 1973.

labour. Consequently, in 1992, the Bonded Labour System (Abolition) Act was promulgated. Similarly, the Court, in various judgments, extended scope of Article 184 (3) to the matters pertaining to the enforcement of fundamental rights. The Court while taking cognizance of gang-rape case<sup>405</sup> declared that by virtue of Article 184 (3) read with Article 199 the Court has authority to pass any order for the protection and application of fundamental rights.

In *Ms. Shehla Zia and others v. WAPDA*<sup>406</sup> the Court ensured constitutional protection to the right to have quality life. In the instant case, the petitioners challenged the construction of a grid-station nearby a residential area on the green belt property due to potential health hazards to the nearby inhabitants. The Court taken up the case under Article 184 (3) and held that right to have a healthy environment was part of the fundamental rights to life and dignity protected by the Constitution under Article 9 and 14 respectively. The Court observed that life covers all aspects of human existence and all facilities, a person is entitled to enjoy with dignity, lawfully, and constitutionally. The Court permitted construction of the grid-station subject to taking of sufficient mitigating measures, in order to avoid any adverse impacts. This case set a precedent by providing very easy access to the superior judiciary on environment related issues.

Similarly, in the missing persons' case<sup>407</sup>, the Court declared intelligence agencies action to be against fundamental rights. Consequently, most of the missing persons have been recovered. Till 2007, the Supreme Court was not overactive in assuming *suo motu* jurisdiction rather most of the cases were adjudicated upon the receipt of applications under Article 184 (3).<sup>408</sup>

<sup>405</sup> Human Rights Case No. 1 of 1992, SCMR 2001 (SC 1993).

<sup>406</sup> *Shehla Zia and others v. WAPDA*, PLD 693 (SC 1996).

<sup>407</sup> H.R.C. No. 965 (2005).

<sup>408</sup> Shabbir, Syeda Salma. "Judicial Activism Shaping the Future of Pakistan." (2013): 12.

After the mini revolution of 2009 that turned out to be the restoration of the judiciary, including the reinstatement of the then Chief Justice, *Iftikhar Muhammad Chaudhry*. After the restoration of judiciary, the power of judicial review transformed into a powerful judicial activism. Judiciary emerged as an independent state organ where it started taking cognizance of matters pertaining to fundamental rights and public importance more frequently as compared to the previous practice. On the directions and direct supervision of the Chief Justice, the Supreme Court established Human Rights Cell for dealing with the human rights violation cases. In one year, the Supreme Court received more than 54000 cases of human rights violation where more than 53000 cases were disposed off.<sup>409</sup>

In the evolution of judicial activism in Pakistan, judiciary not only successfully isolated itself from military influence of validating its extraconstitutional actions, but also segregated itself from the government control. The scope of Article 184 (3) was broadly exercised that somehow narrowed down the executive sphere. In *Dr. Mobashir Hassan v. the Federation of Pakistan*<sup>410</sup>, the petitioner challenged validity of the National Reconciliation Ordinance, 2007. The Court declared it to be a black law being *ultra vires*, unconstitutional and *void ab initio*. This Ordinance was considered to have been promulgated as an outcome of deal between *Pervez Musharraf* and the PPP for achieving political ends.

On April 19<sup>th</sup> 2010, the President approved Eighteenth Amendment to the Constitution, which *inter alia* amended Article 6 of the Constitution. The government successfully incorporated Amendments to the Constitution, in order to put an end to the validation of extraconstitutional actions of replacing civilian government with the military regimes. The same Article also incorporated provision prohibiting the

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<sup>409</sup> *Ibid.* p. 13.

<sup>410</sup> *Dr. Mobashir Hassan v. Federation of Pakistan*, PLD 879 (SC 2010).

superior judiciary from validating an act which itself amounts to high treason.<sup>411</sup> In December 2011, military could not intervene despite the fact there was prospects of an imminent coup. The Prime Minister, *Yousaf Raza Gilani*, was directed by the Supreme Court to write Swiss authorities to open graft cases against the President, *Asif Ali Zardari*.<sup>412</sup> The Court prosecuted the Prime Minister for non-compliance to the Supreme Court's directions in the NRO case.<sup>413</sup>

The opponents of judicial activism and civil society criticized judiciary for confrontation with the representative government and referred to the selective justice where the Court applied different standards while adjudicating upon the dissolution of assemblies orders. The Court validated dissolution order of both Benazir Bhutto's governments. Nevertheless, the Court had invalidated the dissolution order of the other governments.<sup>414</sup> In one case, the Court refused non-restoration of the ousted government.<sup>415</sup> While in the other case, the Court reinstated *Sharif's* government.<sup>416</sup> On contrast, in the case of PPP government, the Court upheld dissolution orders of legalizing the extraconstitutional actions at the expense of elected government. The courts failed to apply the same standards while reviewing dissolution orders. The opponents of judicial activism highly criticized judiciary for such selective and biased approach.

In *Air Marshal (Retd.) Muhammad Asghar Khan v. General (Retd.) Mirza Aslam Baig, former Chief of Army Staff & others*<sup>417</sup> the petitioner's case was registered under Article 184 (3) on the receipt of a letter to the Chief Justice regarding

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<sup>411</sup> Article 6 (2A) of the Constitution of Pakistan, 1973.

<sup>412</sup> *Suo Motu Case No. 4, 2010, PLD 553 ( SC 2012)*.

<sup>413</sup> *Dr. Mobashir Hassan v. Federation of Pakistan, PLD 879 (SC 2010)*.

<sup>414</sup> *Ahmad Tariq Rahim v. Federation of Pakistan, 44 PLD 646, 664 (SC 1992)*.

<sup>415</sup> *Federation of Pakistan v. Saifullah Khan, PLD 192-95 (SC 1989)*.

<sup>416</sup> *Nawaz Sharif v. President of Pakistan, PLD 570 (SC 1993)*.

<sup>417</sup> *Air Marshal (Retd.) Muhammad Asghar Khan v. General (Retd.) Mirza Aslam Baig, former Chief of Army Staff & others, Human Rights Case No.19 OF 1996*.

backdrop of the general elections of 1990 and consequently *Nawaz Sharif* became the Prime Minister. The letter alleged that former Army Chief, *Mirza Aslam Baig*, in collaboration with the Director General ISI, *Assad Durani*, had withdrawn a sum of Rs. 160 Million Rupees from *Mehrban* Bank prior to election for distribution among people, in order to ensure victory of the PML (N) government. Till 2012, the case remained pending. The Chief justice took up the case and declared that neither the President nor the Armed forces are expected to establish of Election Cell, in order to extend support in favour of or against any political party. In the presence of any direct or indirect support from the above sources, the citizens could not successfully elect their representatives in a fair, honest, and transparent manner. The Court held that the 1990 elections were rigged.

In *Arsalan Iftikhar's case*<sup>416</sup> the Chief Justice took *suo motu* on June 6<sup>th</sup>, 2012 against his son, *Dr. Arsalan Iftikhar* with response to allegations of receiving bribes from business tycoon, *Malik Riaz*, in order to influence judicial process initiated against *Malik Riaz*. The Court held that it is established by the precedents that by virtue of Article 184 (3) the Supreme Court is entitled to exercise inquisitorial powers. Nonetheless, cognizance of this matter has been taken for a particular object and this Court aimed to exercise such powers in order to achieve that object. The Court observed that the outcome of this case is directly associated with the autonomy and integrity of judiciary. Individuals' attempts, even failed one, for influencing the course of justice were declared to be illegal and punishable under various laws. The parties in this case are liable to punishment if proven guilty by a court of competent jurisdiction.

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<sup>416</sup> *Suo motu* Case No. 5 (2012)

Even though, this *suo motu* action was not meant to adjudicate upon the guilt or innocence of the alleged parties. The underlying objective regarding the cognizance of this matter was to clarify information which amounts to public importance. In the instant case, the matter of public importance was aspersion on the autonomy and integrity of the superior judiciary. The statement given by *Malik Riaz* in open court clarified all the doubts associated with this case. *Mr. Riaz* admitted in writing that judiciary remained hostile to the grant of favors, in spite of his own efforts to the contrary. To say with more simplicity, a resourceful person like *Malik Riaz* failed to compromise the autonomy and integrity of judiciary, irrespective of the alleged payment of 34 crores rupees. The Court left this case to the investigating agencies and the trial court of competent jurisdiction, which was to be decided on the basis of available evidence. This case also raised concern about the impartiality of the apex Court.

Through judicial activism, the courts prohibited military interventions and validation of extraconstitutional actions. Judiciary which remained vulnerable to military actions is now overactive to repose public confidence in the judicial organ. Undoubtedly, military's direct rule and its transformative preservation in civilian governments have significantly undermined both judicial as well as representative institutions of the state. Judiciary, increasingly taking cognizance of the matters of public importance and the matters related to the application of fundamental rights. This expanding scope of Article 184 (3) is ultimately reducing the functional sphere of the executive. Consequently, the superior judiciary is being criticized for excessive judicial activism as it assumes functions which are purely in the executive domain.

The proponents of this activism argue that in default of the executive to perform its functions, judiciary has to perform the same functions as a consequent of

the inefficiency and bad governance of the former.<sup>419</sup> The opponents, however, justify their stance on various legitimate grounds: they argue that judiciary should by no means transgress its jurisdictional limits, in order to perform pure executive functions. There are different tools to criticize the executive for non-performance of its functions such as media and public discourse. Instead of its transgression to the executive sphere, judiciary should assist the fragile government which remained influenced by military throughout Pakistan's constitutional development.

#### 4.3. JUDICIAL REVIEW: A TWO-EDGED WEAPON

This segment highlights two-pronged tendency of the judiciary: judiciary's operational dynamics and its approach to interact with the executive branch, particularly, post *Musharraf* democratic transition. With the imposition of emergency of November 3<sup>rd</sup>, 2007, the Chief Justice and other judges who were dysfunctional were turned into martyrs for the cause of judicial independence. Nonetheless, the restoration of the judges, after lawyers' prolonged movement, supplemented by media, civil society, sincere efforts of the political leadership, transformed them into heroes.<sup>420</sup> In the legal and democratic history of Pakistan, it was for the first time that judiciary started functioning with real autonomy after its restoration on March 17, 2009. The newly independent judiciary not only strived to ensure its autonomy from the entrenched military, but also seek its independence from the control of other state organs. For maintaining and reinforcing its autonomy, judiciary has repeatedly invalidated the executive and legislative actions.

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<sup>419</sup> Waseem, Mohammad. "Judging democracy in Pakistan: conflict between the executive and judiciary." *Contemporary South Asia*, vol. 20, no. 1 (2012): 29.

<sup>420</sup> Waseem, Mohammad. "Judging democracy in Pakistan: conflict between the executive and judiciary." *Contemporary South Asia* 20, no. 1 (2012): 21.

Judiciary, at the expense of the other state organs, got populist role in the context of accountability. The Superior Judiciary expanded its authority of original and *suo motu* jurisdiction under Article 184 (3). This extraordinary expansion of jurisdiction adversely affected and narrowed down the functional space for the executive branch of the government. There are two competing approaches towards the emerging judicial activism in Pakistan: The political opposition, influential people from business and professional community, bureaucrats, technocrats, and their followers in media and civil society supported and advocated this activism. However, the ruling government considered it as a tool to undermine democratic system.<sup>421</sup>

Nevertheless, the supporters of judicial activism felt alienated within two years of its restoration on various grounds: firstly, judicial oversight of the executive's functioning in matters pertaining to the appointment, transfer, and promotion of the bureaucrats and the judges. Secondly, the constitutionality of certain laws created more public concern to challenge this judicial activism. Considering the long history of vulnerability of representative institutions to autocratic despots, backed by judiciary in validation of extraconstitutional actions. The recent interbranch conflict between judiciary and the executive emerged as a real challenge to democratic transition.

#### **4.3.1. Constitutionalism and Test of Judicial Review**

In the trichotomy of powers, judicial control of the executive's functioning lies in judicial review. For the survival of both the constitutionalism and the government, the government should not decide the extent of judicial oversight, to which the government shall or shall not tolerate and accept. Rather, the courts should inevitably

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<sup>421</sup> Ibid.

realize and demonstrate how much misuse of authority they will permit.<sup>422</sup> In Pakistan, the dynamics of judicial review reflects the broader political environment, which is beyond the doctrine of separation of powers for the institutional architecture, and which is more typical in Presidential form of governments.<sup>423</sup>

Judiciary has increasingly penetrating in the affairs of the representative governments for keeping surveillance over the affairs of the latter, which is not limited to constitutional matters; rather it covers all aspects of its functional sphere. This control in the hands of judiciary holds other state organs responsible for acts of their omissions and commissions. This judicial accountability often led to establishment of laws which circumvents the formal legislative process, legislation through Parliament. Judiciary virtually assumes governance, by replacing its authority with that of the governmental authority, directs the executive to undo its administrative actions.<sup>424</sup>

Another aspect of the courts' commitment to constitutionalism lies in the fact to invalidate the laws with disregard to the opinion or consideration of the political leadership. In *Mahmood Khan Achakzai v. Federation of Pakistan*<sup>425</sup> the petitioner challenged the validity of constitutional amendment to incorporate Article 58 (2) (b), authorizing the President to dissolve assemblies at his own discretion as evident at four times in less than a decade. The Court confirmed the alleged amendment and declared it to be a valid provision of the Constitution. The confirmation and validation of the alleged Article put responsibility on Parliament not to omit the same from the

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<sup>422</sup> Makhdoom Ali Khan. The Constitutionalism of the Islamic Republic of Pakistan. (Lahore Pakistan Law House, 1986): 29.

<sup>423</sup> Domingo, Pilar. "Judicial independence: the politics of the Supreme Court in Mexico." *Journal of Latin American Studies* 32, no. 3 (2000): 733.

<sup>424</sup> Waseem, Mohammad. "Judging democracy in Pakistan: conflict between the executive and judiciary." *Contemporary South Asia* 20, no. 1 (2012): 22.

<sup>425</sup> *Mahmood Khan Achakzai v. Federation of Pakistan*, PLD 426 (SC 1997).

constitutional scheme.<sup>426</sup> Nevertheless, in *Sindh High Court Bar Association v. Federation of Pakistan*<sup>427</sup>, the Court itself directed the government to pass the NRO as an Act of Parliament. On its default to pass it from Parliament, the Court invalidated the NRO. The validation of constitutional provisions such as Article 58 (2) (b) is considered more distractive to the democratic transition than that of the Martial Law itself.<sup>428</sup>

Similarly, the 18<sup>th</sup> constitutional amendment of April 2010 led to a severe reaction from legal community and it was considered contrary to salient features of the Constitution. The alleged issues were about the composition of the Judicial Commission, having final authority to approve or disapprove the judges' appointments, and the Court's jurisdiction to invalidate a constitutional amendment. The Supreme Court, in its proceedings wherein the 18<sup>th</sup> Amendment was challenged, also referred to the Indian case laws<sup>429</sup> regarding the basic structure and salient feature of the Constitution. On this issue, legal opinion has been divided into two discourses: one side followed the Indian model and argued that superior courts have conceived a similar architecture of the Indian basic structure doctrine, which is comprised of protection to Islamic provisions, federalism, parliamentary form of government, and judicial autonomy.<sup>430</sup>

The other side argued the judiciary's unwillingness to strike down constitutional amendments. Despite the fact that in number of cases the Court

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<sup>426</sup> Ibid.

<sup>427</sup> *Sindh High Court Bar Association v. Federation of Pakistan*, PLD 879 (SC 2009).

<sup>428</sup> Siddique, Osama. "The Jurisprudence of dissolutions: presidential power to dissolve assemblies under the Pakistani Constitution and its discontents." *Ariz. J. Int'l & Comp. L.* 23 (2005): 615.

<sup>429</sup> *Golaknath v. state of Punjab*, AIR 1643 (SC 1967), the Court held fundamental rights have constitutional protection and Parliament cannot abrogate them; *Kesavananda Bharati v. State of Kerala*, 4 SCC 225 (1973), the Court laid down a doctrine for the protection of the salient features of the Indian Constitution. According to the new doctrine, Parliament could not alter the basic structure of the Constitution;

<sup>430</sup> *Mahmood Khan Achakzai Case v. Federation of Pakistan*, PLD 426 (SC 1997); *Zafar Ali Shah v. General Pervez Musharraf*, PLD 869 (SC 2000);

recognized and acknowledged certain basic features of the Constitution. Nonetheless, the Court later on endorsed that the enforcement of these feature is not the Court's job.

#### **4.3.2. Judicial Populism: Executive Response**

One aspect of judicial activism is to fill the executive vacuum. Judiciary comes forward when the government fails to deliver as per expectations of people. People of Pakistan who are very much disappointed and frustrated from their democratic institutions, appreciate the courts' *suo motu* actions on the executive matters. This wave of judicial activism wins public confidence in judiciary at the cost of the civilian government. The opponents of judicial activism believe that the superior judiciary reached the exalted position of governance to win minds and hearts of people at the expense of the civilian rule and the representative governments. The Superior Judiciary took cognizance of various issues of public interest and received appreciation across the board. The Supreme Court warmly welcomed and entertained matters of common interest through simple applications, news reports, or media talks. The Supreme Court, without considering any legal formalism, entertains those matters by invoking its original and *suo motu* jurisdiction, guaranteed by Article 184 (3).

The Constitution envisages two tests, as elaborated by the Superior Courts' judgments, for invoking jurisdiction of the Supreme Court under Article 184 (3): matter of public interest and violation or enforcement of fundamental rights. For this purpose, the Supreme Court of Pakistan established Human Rights Cell, which annually receives thousands of applications and the Court disposes of those applications accordingly. For common people, this is the best way to get resolve their grievances expeditiously. Nevertheless, there are so many implications attached with the exercise of this power. It is not only affecting the dignity and functioning of other

state organs and officials, but also leaving adverse impacts on judiciary and constitutional role of the Superior Courts.

The newly restored judges, through *suo motu* jurisdiction, addressed common issues, ranging from the highest level to the pettiest nature. Judiciary played this card very wisely not only against military dictators and their affiliates, but also against the representative institutions and successfully earned the title of 'people's judiciary'<sup>431</sup>. The Supreme Court, in number of cases, dealt with the cases<sup>432</sup> involving corruption in public as well as in private sectors. The Court, after striking down the NRO, directed the government to pursue corruption cases against the sitting President, Asif Ali Zardari.<sup>433</sup>

Unlike corrupt politicians, the Supreme Court claimed moral uprightness for judiciary and cultivated its image as a guardian of the interest of the exploited people. Society where people are always remained vulnerable to discrimination, injustice, exploitation, and were deprived of basic necessities, public interest litigation earned a very positive name for judiciary and it turned out to be a legal mechanism for its populist stance. Nonetheless, the unenthusiastic inclination towards dispensation of

<sup>431</sup> Ansar Abbasi, Courts bound to help people. "The News" (July 13, 2009).

<sup>432</sup> ETPB case, the Supreme Court took cognizance of the impugned sale and blocked the controversial sale of 240 acres worth billions of Evacuee Trust Property Board, Karachi land and directed the government for new survey be conducted by the ETPB and its price be fixed accordingly; the Bank of Punjab case, the Court took cognizance of the mega corruption case where the Haris Steel's owner with the convenience of the Bank of Punjab's president, Hamish Khan took a financial facility of Rs. 8.6 Billion Rupees fraudulently on bogus documentations. The Court ordered for the confiscation of their property, in order to recover the alleged amount; Murree Gas Pipeline Project, the Court took cognizance against the alteration in the Murree Gas Pipeline Project, in order to facilitate the Chief Minister's son, Hamza Shahbaz Sharif's bungalow at Dunga Gali. This construction could allege to cost Rs. 750 Million extra and cutting down thousands of trees; similarly, the Court also took cognizance over the extension of the canal road, Lahore, aimed to facilitate a particular segment of the society at the expense of hundreds of trees; in Federal Government Housing Foundation case, the Court took cognizance of the government land was given by the Federal Government Housing Foundation for peanuts and purchase of 2000 kanals in the out suburbs of Islamabad for government housing scheme. The Court directed inquiry into the matter, which reported irregularities in the plot's allotments; the Court while taking cognizance of the Pakistan Cricket Board, which alleged to have been involved in embezzlement of Rs. 07 Billion Rupees; the Court took cognizance of electricity theft by the ex-army chief, Musharraf and some other influential inhabitants of Chack Shezad, Islamabad. The Court ordered proper inquiry into the matter.

<sup>433</sup> Waseem, Mohammad. "Judging democracy in Pakistan: conflict between the executive and judiciary." *Contemporary South Asia*, vol. 20, no. 1 (2012): 24.

justice at the root level is sharply opposite to the discourse of judicial autonomy. The conviction rate at about 5% to 10% made the justice system unavailable and disappointing.<sup>434</sup> Within judicial fabric, judiciary faces so many challenges: inadequate number of judges at domestic level, lack of professionalism, lack of accountability, uncontrolled corruption, coupled with procedural delays and non-delegation of authority and its exercise in the garb of *suo motu* litigations.

The overwhelming flow of public interest litigation created obstacles for the constitutional functioning of the Court. The superior judiciary is more likely to respond and adjudicate upon the matters leading to its populism, which is contrary to the exercise of its appellate, interpretive, and advisory jurisdiction. Contrary to the general principles, where a dispute is initiated at the court of first instance and filed at the Supreme Court as a final form to resolve the dispute. In public interest litigation, the Supreme Court takes cognizance of matters in first instance and disposes of the same at its own discretion, either by itself or refers the same to subordinate courts.

The expansion of *suo motu* jurisdiction not only increasing workload on the Superior Judiciary but also adversely affecting its dignity for the Supreme Court is neither a trial court nor a civil court of first instance to deal with petty nature of case. As evident from the *suo motu* cases, where judiciary frequently assumes legislative and executive functions, the Supreme Court is neither expected to supervise the investigation nor expected to exercise pure executive functions. Judiciary, despite bringing reforms in judicial apparatus, is reducing functional space for the executive. The superior judiciary achieved more out of the executive's loss through governance and not through its own performance. In some cases, the Court while dictating its authority directed the government to implement a particular action and left the latter

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<sup>434</sup> Ibid. p.27.

with no other option. In most of the public interest litigation cases, the Superior Courts undermined credibility of the executive. In retaliation, the latter relied on delaying tactics in the implementation of the courts' directions by filing review petition or misinterpretation of decisions.

The government strategy, with response to judicial activism, characterized problematic association between the two sides. In terms of interpretation and implementation of laws, the superior courts wanted to keep this prerogative at its own discretion. Simultaneously, the Court intended to put in place some legal institutional arrangements, in order to avoid potential threats to judicial autonomy. At the same time, judiciary felt obligated to undertake the issue of governance so as to address people's grievances. Nevertheless, this judicial activism also opened an avenue of its criticism. The extent the government was put on the defensive side on the issues concerning governance; judiciary was correspondingly discredited in public. These public interest litigations also sustained huge losses to public treasury, shook public trust in the elected representatives, created elements of disrespect to international treaty obligations, and created prospects of jurisdictional conflicts with the international forums.

Furthermore, Superior Judiciary is free to take action against any public officeholder and could challenge any legal instrument, but itself not remained accountable by any means for its verdicts with reference to any institution, community, or group. Generally, the Court held itself accountable, for its decisions, to the public at large, which is very hypothetical and abstract term. In the post 2009 democratic transition coupled with judicial activism, the government felt itself overly constrained in sphere of its dealings with judiciary. Besides its legal obligation to comply with court's directions, the government was required to show serious

concerns to public opinion, to which it must appeal in final sense.<sup>435</sup>

#### 4.3.3. Judiciary Hampers Functioning of the Democratic Institutions

Since its restoration in 2009, Superior Judiciary witnessed to have been exercising its authority more rigorously with maximum judicial activism. The appointment and promotion in the bureaucratic fabric is considered to be purely an executive function. In *Tariq Aziz-ud-Din and Others*<sup>436</sup> the Court set aside the impugned order of promotions on the pretext of its violation to the service laws and rules. On November 6<sup>th</sup>, 2009, the petitioner moved an application to the Court regarding the promotions of various Civil Services Groups from BS 21 to BS 22 without taking into account seniority, merit, and fair play. The petitioner alleged that the applicant's juniors have been promoted superseding the former without any reasonable justification. The Court required comments from the concerned authorities and decided to fix the matter in Court by notifying all the concerns.

Meanwhile other affectees of the impugned order of the government also approached the Court, whose petitions were clubbed with this petition. The petitions challenged the impugned order on various grounds: the authorities must exercise the discretionary powers as sacred trust with application of mind, ensuring equal opportunities as contemplated by the Constitution. The Government made gender discrimination, while exercising its authority, by promoting a lady who was much below in seniority. The alleged promotions were made without assigning any particular reason regarding exercise of such discretion. The government challenged the Court's jurisdiction and contended that the trichotomy of powers envisaged by the Constitution that entrusts powers in each organ to perform its functions in its own

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<sup>435</sup> Ibid. p.28.

<sup>436</sup> Tariq Aziz-ud-Din & others, SCMR 1301 (SC 2010), Human Rights Cases No.8340, 9504-G, 13936-G, 13635-P & 14306-G TO 14309-G OF 2009.

sphere. In the instant case, the subject matter is purely an executive subject as articulated in Article 240.

The Court observed that good governance is based on strong and honest bureaucracy. The civil services being the essential part of our administration, depends upon purity of the services. The purity of services can be achieved only if merit prevails and the promotions are made on merit, according to the rules, laws and the Constitution, without favoritism and nepotism. Generally speaking, promotions in disregard of the law are expected to obliterate the service structure. The Court quashed the impugned order of promotion and demoted the promoted officers to their previous positions. The government was further directed to consider the cases of all other officials already serving in the BS 21 for fresh promotions in view of the Court's observations made above. In the instant case, despite exercising its authority to demote officials, the Court should have referred the same to the government for reconsideration.

Similarly, in *Hajj Corruption Case*<sup>437</sup> the Supreme Court of Pakistan received a letter as well as received a request from Senator, *Khalid Mahmood Soomro*, through a TV channel regarding alleged corruption in Hajj arrangements by the Pakistani officials who were responsible to hire building for the pilgrims. The officials hired a building which was distantly situated from the *Haram* on inflated rates. The Prime Minister constituted a committee of Parliamentarians to visit Saudi Arabia and observe the Hajj arrangements. The committee reported corruption and malpractices by the Ministry of Religious Affairs in hiring building for the pilgrims.

The alleged matter was of public interest and was greatly concerned with the country's prestige. The Court call for comments from the Sectary of the Religious

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<sup>437</sup> *Suo motu* Case No. 24 of 2010.

Affairs and Ministry of foreign Affairs. As per the news reports, *Rao Shakeel Ahmed*, former DG Hajj, was appointed in violation of the rules. The Court was informed that *Rao Shakeel Ahmed* was facing two cases when his name was approved by the Prime Minister for the appointment as DG Hajj; the criminal proceedings before the accountability court and was also facing the NAB investigation on the charges of having assets beyond known sources of income. By the time of appointment, his name was already in the ECL.

On the Court's directions, the DG FIA, Mr. *Waseem Ahmed*, after submission of his report, constituted an investigation team, that headed by Director FIA, *Hussain Asghar*, so as to further investigate the matter. In the preliminary report, the DG FIA urged on further inquiry to ascertain the real culprits in the alleged corruption and mismanagement. The report also highlighted that the Sectary has no control over the DG Hajj who assumed uncontrolled authority in financial matters and administration. It was also alleged that the hiring process, followed by the repatriation of *Shakeel Ahmed Rao*, was not according to government policy, which itself reflects mismanagement and Sectary's lack of control.

The Director FIA unleashed various aspects of the alleged Hajj scam and collected sufficient material against influential persons. He was transferred to Gilgit Baltistan as Inspector General Police. The Court sought explanation from *Malik Muhammad Iqbal* who had assumed the charge of the DG FIA. He showed consent and write to the authorities for the reposting of *Hussain Asghar* as DG FIA, in order to complete the investigation, but no response was received. So, the Court directed the Sectary, Establishment Division, to issue transfer orders for resuming his duty to probe the case and in default, the former shall face contempt of court proceedings. In

compliance with the Court's order, Sectary Establishment, *Sohail Ahmed*, who issued notification of *Hussain Asghar's* transfer, was made OSD.<sup>438</sup>

In the instant case, two significant points regarding the Court's jurisdiction have been raised: transfer and posting, which are considered to be executive functions. Furthermore, courts are not authorized to keep surveillance in the investigation of a criminal case. The Court while admitting the fact justified its stance that even though transfer and posting is an executive function, but in some unavoidable situations the Court can pass such orders. The Court further observed that investigation is nothing but collection of evidence, leading court to a fair conclusion about the accused. *Hussain Asghar* was impartially conducting investigation under the supervision of the Court. So, his reposting on the same matter would not cause any problem. Further, the Sectary who complied with the Court's order has been penalized as OSD.

The Court held that the discretionary authority vested in the authorities should be exercised judicially, fairly, and reasonably, and the same should not be exercised whimsically, capriciously, or arbitrarily.<sup>439</sup> The Court directed the Federal Government to implement notification regarding reposting of the Director FIA, *Hussain Asghar*. The Court held that notification of *Sohail Ahmed* as OSD is also not maintainable in law. The Court directed the authorities either to repost him as Sectary Establishment or post him against any other assignment which is appropriate to his status, abilities, and work.<sup>440</sup>

In the instant case, the Court admitted the fact that transfer and posting is not within the exclusive jurisdiction of the courts and the same fall within the authority of

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<sup>438</sup> Ibid.

<sup>439</sup> Tariq Aziz-ud-Din & others, SCMR 1301 (SC 2010); Abu Bakar Siddique v. Collector of Custom, SCMR 705 (SC 2006); Abid Hussain v. PIAC, PLC 1117 (SC 2005); Walayat Ali v. PIAC, SCMR 650 (SC 1995).

<sup>440</sup> Ibid.

the executive. Nevertheless, the Court assumed these powers in exceptional cases. These exceptional circumstances may lead to various potential threats: confrontation between the state organs, clashes within the bureaucratic fabric, disrespect towards government policies and wisdom, public distrust towards representative institutions as well as officials of high officeholders.<sup>441</sup>

Similarly, fixation of price of daily commodities is purely an executive function. The Lahore High Court took cognizance of oil and sugar price hiking. Without any parliamentary oversight, the ministry of petroleum authorized a group of oil companies, Oil Companies Advisories Committee (OCAC). The Committee increased oil prices according to the increase in the international market. Nevertheless, the Committee has not reduced the prices correspondingly with the decrease in international market. The Court took cognizance and directed the NAB to investigate the matter.<sup>442</sup>

The Lahore High Court also took cognizance of the sugar price hike and directed the NAB to probe the matter. The NAB report implicated the involvement of eight Ministers and Government soft policy was held responsible for sugar crisis. The Court while assuming the executive function, fixed sugar price to be Rs. 40/ kg so as to control the inflation rate and its availability to common people. The Pakistan Sugar Mills Association, the Federal and all Provincial Governments filed an Appeal at the Supreme Court against the impugned order and contended that the sugar industry would turn to chaos and would require subsidy up to Rs. 40 billion. The Court upheld the impugned order and held that sugar should be sold at the same price fixed by the Lahore High Court till determination of the new price.<sup>443</sup>

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<sup>441</sup> Ibid.

<sup>442</sup> Ghias, Shoaib A. "Miscarriage of chief justice: judicial power and the legal complex in Pakistan under Musharraf." *Law & Social Inquiry* 35, no. 4 (2010): 993.

<sup>443</sup> <https://fp.brecorder.com/2009/09/20090919962741/>

Likewise, the privatization of Pakistan Steel Mills (PSM) was one of the important cases against the executive actions taken up by the Court, making its way to further judicial activism.<sup>444</sup> The Court quashed \$362 Millions USD bid for the privatization of the PSM on the pretext of illegalities and commissions. Despite the claims that the Court has saved a loss of billions by striking down privatization of the PSM, the succeeding government declared that the PSM caused a loss of Rs. 23 billion in one financial year. Even though, the Federal Government has given a bailout package of 14.6 billion to the PSM. The liability of its payable debt reached 82 billion till October 31<sup>st</sup> 2012, which crossed 100 billion in December 2013. Following the invalidation of the privatization policy of the government, the PSM has not made any profit rather it bore huge losses, which is evident to be increased as compared to the alleged savings.<sup>445</sup>

The country received another blow when the Court took cognizance of the Rental Power Plants (RPPs) on the applications of the parliamentarians, *Faisal Saleh Hayat* of PML (Q) and *Khawaja Muhammad Asif* of PML (N) under Article 184 (3) of the Constitution. Besides eight private international companies, *Barge Mounted Karkay* was given a short-term contract for five years on differential terms. The agreed tariff, Rs. 35/- to Rs. 50/- per unit, was extremely higher than that of the Independent Power Plants, IPPs. The Supreme Court invalidated the contract on the basis of huge corruption. The Court observed that it can exercise its authority of review on the legality and transparency of the policy implementation on the ground of fairness, open-competition, and legality. The Court observed that without calling fresh bids, the increase in advance payment from 7% to 14%, which runs to billions and

<sup>444</sup> Muhammad Raheem Awan, "Judicial Activism in Pakistan in Commercial and Constitutional Matters: Let Justice be Done though the Heavens Fall", University of Bedfordshire, United Kingdom, (December 2013): 14.

<sup>445</sup> *Ibid.* 15.

leads to non-transparency and fails test of fairness and open competition. The Court declared the contract to be in contravention of Article 9 and 24 of the Constitution as well as against the Regulatory Laws.<sup>446</sup>

The Court rendered the contract to be *ab initio* void, having no legal effects. The Court further declared that functionaries of the regulatory bodies are *prima facie* involved in the corrupt practices. The Court directed the NAB authorities to arrest 27 officials of the regulatory bodies and public representatives, including the Prime Minister, *Raja Parvez Ashraf*. The NAB authorities attempted to settle the issue with the *Karkey* amicably, but the Court staved off the same. Consequently, the *Karkey* approached the arbitration tribunal, International Centre for Settlement of Investment Disputes (ICSID) as per the agreed international arbitration forum in the contract, against government of Pakistan for damages for non compliance to the contract. On August 22<sup>nd</sup>, 2017, the ICSID declared an Award of more than one billion US dollars against the government of Pakistan.<sup>447</sup>

The judicial activism in such cases creates so many complications and repercussions: a huge loss to the national exchequer, direct confrontation with the executive, jurisdictional conflict with international legal forums, discouragement of foreign direct investment in Pakistan, public distrust in the civilian governments, and the Court's supervisory role in the investigation and trial, which is considered against the international standards.

The Supreme Court of Pakistan, without realizing terms of the contract where the ICSID was an agreed forum for settlement of the disputes, invalidated the contract. The Supreme Court further aggravated the situation by prohibiting the NAB authorities to amicably settle the alleged matter with the *Karkey*, which turned out to

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<sup>446</sup> Ibid.

<sup>447</sup> Ibid.

be a huge penalty against government of Pakistan as a compensation for the violation of the contract. These decisions are potentially creating jurisdictional conflict with the international legal forums. The ICSID is a dispute settlement forum under the auspicious of the World Bank Group. If the Court declines to implement the Award against the government, the international community, particularly, the World Bank may adopt a non-cooperation policy with the government of Pakistan. The foreign investors will barely consider investing in Pakistan where judiciary is not showing solidarity to the international rules, treaty obligations, and Awards of the international forums.

The Asian Human Rights Commission also showed concern on judiciary's supervisory role in the process of the investigation.<sup>448</sup> Keeping in view the concept of fair trial and due process of law protected under Article 10-A<sup>449</sup>, such supervisory role of judiciary is considered violating Article 9<sup>450</sup> of the Constitution. Furthermore, such contradictory decisions create public distrust in the civilian governments and may lead to inter-state confrontation, create prospective threats for Pakistan and its citizens, which is more disastrous than the short-term advantages derived from such actions.

In another case, *Reko Diq<sup>451</sup> Gold and Copper Mines Project*, the Court, in exercise of its appellate and original jurisdiction, took cognizance regarding the alleged corruption, bribes, and kickbacks from the foreign investors in award of contract to the foreign investment companies. There were so many allegations: the

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<sup>448</sup> Muhammad Raheem Awan. "Judicial Activism in Pakistan in Commercial and Constitutional Matters: Let Justice be Done though the Heavens Fall", University of Bedfordshire, United Kingdom, (December 2013): 14.

<sup>449</sup> Article 10-A of the Constitution of Pakistan.

<sup>450</sup> Article 9 of the Constitution of Pakistan, 1973.

<sup>451</sup> Reko Diq is a small town of Chagi District, Balochistan. It got impetus for its huge gold and copper reserves and is considered to be the world 5<sup>th</sup> largest gold deposit, discovered by Geological Survey of Pakistan back in 1978, Herald, a monthly magazine of politics and current affairs, Karachi, Pakistan, reported.

Governor of Baluchistan Province signed the *Reko Diq* agreement without cabinet's approval and thereby gave approval of 30 years lease to Tethyan Copper Company<sup>452</sup> without considering the expiry of its exploration licence, relaxation in the mining rules of 1970, transferring of Baluchistan's government share, drilling in violation of Baluchistan Mineral Rules, 2002, and concealment of the discovered resources.<sup>453</sup>

In the alleged project, the TCC held 75% of shares while Balochistan had 25% of the total shares with 2% royalty from the extracted minerals. The TCC and the government of Balochistan reached a deadlock on two main issues: the TCC wants Balochistan to bear 25% financial liability as per its share in the project, which the latter refused and the alleged involvement of the Chinese company in the project. Over a period of five years, the TCC claims to have invested over \$500 million USD in the exploration and total investment was projected to be \$5 billion.<sup>454</sup>

The Court rendered the contract to be void *ab initio*, being executed in violation of and repugnant to the various statutory provisions<sup>455</sup>. In 2012, the TCC submitted arbitration claims at the ICSID for compensatory damages amounting to \$9.1 billion USD, based on fair market value of its investment and additional claims of \$2.3 billion as a pre-award compound interest. The ICSID has already rejected Pakistan's allegations of corruption and malpractices by the TCC in the alleged project and ruled against the former for unlawful denial of the mining lease to the

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<sup>452</sup> A joint venture between Chile's Antofagasta and Canada's Barrick Gold Corporation.

<sup>453</sup> Muhammad Raheem Awan, 'Judicial Activism in Pakistan in Commercial and Constitutional Matters: Let Justice be Done though the Heavens Fall', University of Bedfordshire, United Kingdom, (December 2013); 14.

<sup>454</sup> Zafar Bhutta, 'Reko Diq gold mine project: Pakistan may face \$11.5-billion penalty'. The Express Tribune, July 12, 2017.

<sup>455</sup> Mineral Development Act, 1948, the Mining Concession Rules, 1970, the Contract Act, 1872, the Transfer of Property Act, 1882.

latter in *Reko Diq*. The legal experts expect Pakistan to face a penalty of approximately \$11.5 Billion USD for its failure in awarding the project to the TCC.<sup>456</sup>

The Supreme Court's populism, without realizing consequences and magnitude of actions, in response to the *suo motu* actions has motivated the High Courts to follow the same pattern of adjudication. In number of cases<sup>457</sup>, the Lahore High Court, under its *suo motu* authority, has taken cognizance of the matters involving public interest and enforcement of fundamental rights. The superior judiciary without realizing of the dignity of other state organs, financial liability to the national exchequer, treaty obligations, and international covenants, kept on taking cognizance of the matters reported on the media or news. This judicial activism has not only led to the likelihood of confrontation among the state organs but reached to a situation of compromise on its own dignity.

The Supreme Court has admitted that the judges' oath required them adherence to the law and the Constitution. The judges cannot act like king, to do

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<sup>456</sup> Zafar Bhutta, "Reko Diq gold mine project: Pakistan may face \$11.5-billion penalty". The Express Tribune, July 12, 2017.

<sup>457</sup> Zarco Exchange Fraud Case, PLD 23 (LHC 2010); the Medical Negligence Case, Sugar and Oil Prices Case and increase in the public transport; *suo motu* action on the news regarding death of a child, died by falling in an uncovered main hole and issued directions for registration of criminal case against the responsible officials of the concerned provincial government; The Peshawar High Court took *suo motu*, based on a news report, regarding the selling of substandard meat and grills, *chapli kababs*, and summoned senior provincial officials: the director general health, the director food, the capital city police officer (CCPO), the director general live stock, and a show cause notice to the Chief Secretary of the Province. The Court directed the authorities to amend the outdated and ineffective Food Ordinance of 1965; the Court also took cognizance of illegal car-parking and bus stops and summoned the senior most provincial officers, in order to explain their position on the alleged issue; the Secretary of Transport, the Commissioner and the Deputy Commissioner, the CCPO, and the additional inspector general of traffic police; the Peshawar High Court took cognizance, based on news report of a TV channel, against disallowing of women to cast vote during local body elections. The Court directed the authorities for withholding the elections' results in two constituencies and directed the arrest of the responsible persons who restricted women from casting their vote. One the next hearing, the Court was dissatisfied with the turnout and directed the Election Commission of Pakistan for conducting re-election in more than fifty-four polling stations and suspended elections in two constituencies. The Court directed the ECP to forward the immediate summary to the government of Pakistan suggesting essential changes in the Representation of the People Act, 1976 to make sure strict action against preventing female from casting vote. The Court also directed the government to table the alleged Act in Parliament, and ensure amendment to it so that to ensure women participation in the election. However, on appeal, the Supreme Court quashed the impugned order and held that the High Court has no power to regress into the ECP's sphere nor can it assume such authority not delegated by the Constitution.

whatever appeals to their mind. The Supreme Court observed that judiciary should not indulge in the matters which are not in the exclusive jurisdiction of the courts. While responding to the *suo motu* actions of the High Courts, the Supreme Court prohibited the High Courts to intrude in the matters of the Election Commission of Pakistan. The Court held that the exercise of extraordinary writ jurisdiction is subject to the non-availability of alternative adequate remedy.<sup>458</sup>

Nevertheless, judiciary, as a turned out of the *suo motu* actions, directed the executive for compliance and accessibility of certain facilities or commodities to the masses or a particular price, which further aggravated the situation and consequently had earn a bad name to the superior judiciary. The Superior Courts, without focusing on its constitutional role and adjudication upon the long awaited cases, taking cognizance of the petty cases and calling explanations of the high officials, which amount to direct intervention in the executive sphere, with reference to functioning, priorities, and importance of matters dealt with by the latter. The superior courts, in its *suo motu* actions, also directed the legislature to amend and pass statutory laws, in order to accommodate or ensure certain facilities to the public.

Keeping in view the excessive judicial activism, the critics believes that such activism creates likelihood of a government ruled by judiciary. This implied and so-called democratic transition from military entrenched authority and its transformative preservation is now evolving into another gray zone of a civilian government led by judiciary. The opponents of judicial activism anticipate this over-activeness of judiciary may bring worst experience than the previous military regimes that directly had taken control over the state affairs and have untraced democratic system for more than half of its life.

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<sup>458</sup> Muhammad Raheem Awan, "Judicial Activism in Pakistan in Commercial and Constitutional Matters: Let Justice be Done though the Heavens Fall", University of Bedfordshire, United Kingdom, (December 2013): 24.

#### 4.4. CRITIQUE

To conclude with, judiciary plays an incredible role in shaping the democratic system. Since Pakistan's inception, judiciary was not fully independent and was forced to validate extraconstitutional actions and military takeovers. With the passage of time and its constant efforts, judiciary not only secured itself the autonomy but also reinforced the civilian governments, invalidated extraconstitutional actions of military regime, and constraint unbridled authority of military. Interestingly, judiciary while validating military regimes kept on circumscribing functional circle of military dictators to render power to the civilian government. Judiciary, after its restoration in March 2009, emerged very differently. Judiciary invalidated military takeover and its ancillary orders. To that effect, judiciary provided constitutional protection to the civilian government, articulated constitutional amendment<sup>459</sup> against further military intervention, bar the president's discretion to dissolve the Assembly unilaterally, and prohibited itself from validation of the extraconstitutional actions.

The newly independent judiciary not only secured judicial autonomy from the military dictators and their affiliates but also seek independence from the civilian governments. The Supreme Court, by expanding scope of Article 184 (3), invoked its *suo motu* jurisdiction and felt itself obliged to address public grievances. The Superior Judiciary expanded the scope of its *suo motu* jurisdiction and took cognizance of issues highlighted by media, press, or private individuals. The Court's cognizance of the issues, ranging from the mega corruption cases to very petty nature of cases, earned populist stance for judiciary.

Judiciary, as per public motivation through media, technocrats, civil society, and political opposition, took cognizance of matters which were purely of executive

<sup>459</sup> On April 8<sup>th</sup>, 2010, Parliament passed 18<sup>th</sup> Constitutional Amendment whereby Article 6 was amended, in order to bar the President from dissolving parliament unilaterally, discourage the military intervention, and judicial validation to such extraconstitutional acts in the future.

nature. This judicial activism brought about so many challenges and implications in the democratic and judicial system: further undermined fragile civilian governments, created distrust in the representative institutions, created prospects of jurisdictional conflict with international legal instruments already ratified by the government of Pakistan, also created public concern about international treaty obligations, imposed huge financial liability to public exchequer, shook its own credibility in terms of its functioning, non-delegation of authority to the district courts, and lack of reforms in the conventional system of dispensation of justice.

Despite its confrontation with the other branches of the government, the judiciary should ensure functioning with mutual cooperation and coordination, in order to foster public welfare for which the judiciary as well as other public institutions laid their foundations. Instead of creating hindrance for each others, each state organ should acknowledge the very existence and sovereignty of other state organs. Furthermore, judiciary is neither a panacea for every wrong nor should supervise and guide the executive in carrying out its affairs or policy-making.

Judiciary should not compromise its impartiality by any means, should avoid selective justice, and governance at the cost of the representative institutions. The excessiveness of judicial activism could push Pakistan to a more sophisticated regime of activism, which may be identical with military regime, whereby the civilian government would be dysfunctional and judiciary would virtually assume the executive authority to run the state affairs. Judiciary should focus on how to bring reforms in the conventional system of adjudication, in order to safeguard its dignity and to repose public trust in the judicial as well as the democratic institutions.

## Chapter No. 05

### CONSTITUTIONAL SAFEGUARDS AND JUDICIAL AUTONOMY

In the oscillation of regime shift between military and the civilian governments, the latter remains vulnerable to the former even in its direct rule. There were many contributing dynamics that motivated and justified military authoritative preservation during representative governments. The critics of judicial activism believe that judiciary and media are currently the most challenging factors in the vulnerability of fragile democracy. This segment examines how judiciary secured its autonomy from military and extended the same notion towards the government. Judiciary influences the democratic process subsequently after post-Musharraf regime. This Chapter also analyzes how the fragile democracy strived for its survival and independence, and how the democratic efforts of Parliament for strengthening institutional structure were invalidated and reversed by judiciary on self-assumption of its autonomy. This chapter also highlighted the overall efforts of institutions in the empowerment and protection of individuals instead of strengthening institutional structure.

After Musharraf regime, the government was committed not only to reverse most of the extraconstitutional actions, but was also dedicated to provide constitutional protection to Parliament against any potential aggression. Eventually, Parliament adopted the 18<sup>th</sup> Constitutional Amendment so as to withhold judiciary from validation of extraconstitutional actions and to institutionalize the appointment procedure of the superior courts' judges, in order to keep a modest institutional constraint on judiciary. Nevertheless, the court showed serious concerns and considered it as an attack on its autonomy so ensured its maximum representation in the Judicial Commission and functionally reversed the appointment mechanism to its

pre-18<sup>th</sup> Amendment position, where judges were exclusively appointed by the judges.

### **5.1. ROLLING BACK EXTRA-CONSTITUTIONALISM**

Military interventions leave adverse impacts on the democratic transition. Following the regime shift, on the transformation of power from the dictator to the civilian government, the *status quo* remained dominant. Generally speaking, in the political transition, which is regulated by military and other state actors are either equivocal or otherwise hostile to democratic norms leaving challenges to the democratic transition.<sup>460</sup> Unexceptionally, Pakistan has been languishing between constitutional regimes, between military and the representative governments, for a prolonged period where Musharraf's regime stood with no exceptions. Prior to the restoration of democratic rule, Musharraf's regime had not only secured him as President but also packed judiciary with the PCO judges. Keeping in view military's entrenched authority and its authoritative preservation, military remained influential even after its direct rule was over.<sup>461</sup> Concurrently, *Musharraf's regime* was barely dependant on the new government, who had undertaken to transpose the emergency and its legacy.

In order to roll back extraconstitutional regime, led by Musharraf's emergency, the lawyers' movement sparked throughout the country, which demanded Musharraf's removal and restoration of the deposed judges, including the Chief

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<sup>460</sup> Bali, Asli U. "The perils of judicial independence: Constitutional transition and the Turkish example." *Va. J. Int'l L.* 52 (2011): 276-79; Pollack, Kenneth M., Daniel L. Byman, Akram Al-Turk, Pavel Baev, Michael S. Doran, Khaled Elgindy, Stephen R. Grand et al. *The Arab awakening: America and the transformation of the Middle East*. (Brookings Institution Press, 2011).

<sup>461</sup> Kalhan, Anil. "'Gray Zone' Constitutionalism and the Dilemma of Judicial Independence in Pakistan." (2013):55-56.

Justice.<sup>462</sup> The underlying objectives of this movement were to restore and preserve judicial autonomy from military and to uphold constitutional democracy in Pakistan. Initially, the PPP government, which was governing the country by forming a coalition, was hesitant to remove Musharraf from the Presidency. Nevertheless, the coalition eventually consented on the strategy to impeach him. The Lawyers' movement, which was of course backed by the political lobbies, for restoration of judiciary and democracy, compelled Musharraf to resign from his office, followed by Zardari's election as a President.<sup>463</sup>

The invalidation of extraconstitutional legacy resulted to be more intractable and consequently gave birth to more complex debates and modalities for the restoration of the ousted judges to their respective offices; with the constitutional perspective, the PCO judges and the whole legal order established and validated during military coup could be invalidated and inverted either by a resolution of Parliament or through an Executive Order.<sup>464</sup> With the extraconstitutional perspective, laws and actions validated by judiciary, which was constituted under the PCO, through formal constitutional amendment could not be reversed but modified.<sup>465</sup> The coexistence of both constitutional and extraconstitutional orders, which was essentially an issue of political nature, was very challenging task.

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<sup>462</sup> Faisal Siddiqi, *The Lawyers Movement- Achievements and Challenges*. Teeth Maestro (Sept. 14, 2008), <https://teeth.com.pk/blog/2008/09/14/the-lawyers-movement-%E1%80%93-achievements-and-challenges/>.

<sup>463</sup> Fair, C. Christine. "Pakistan's Democracy: The Army's Quarry?" Nawaz, Shuja, *Crissed Swords: Pakistan, Its Army, and the Wars Within* (New York: Oxford University Press, 2008), 600 pages, hardcover, \$49.95. Siddiqi, Ayesha, *Military Inc.: Inside Pakistan's Military Economy* (London: Pluto Press, 2007), 304p pages, paperback, \$35. "Asian Security 5, no. 1 (2009): 73-74.

<sup>464</sup> Kalhan, Anil. "Gray Zone'Constitutionalism and the Dilemma of Judicial Independence in Pakistan." (2013):56.

<sup>465</sup> Kalhan, Anil. "Constitution and'Extraconstitution': Colonial Emergency Regimes in Postcolonial India and Pakistan." (2010):109-10, 114; Faisal Siddiqi. *Constitutionalism of a Political problem*. News on Sunday (March 30, 2008).

On March 9, 2008, the PPP and the PML (N) signed a declaration, Charter of Democracy, for the formation of coalition government and restoration of the ousted judges. Despite commitment by both the parties to restore deposed judges after the formation of coalition government, they were devoted to repudiate Musharraf's regime, but remained silent as to the fate of the incumbent PCO judges and judiciary as an institution.<sup>466</sup> In fact, both sides of the government were least concerned and sincere in their efforts regarding judges' restoration, particularly *Iftikhar Chaudhry* as Chief Justice.<sup>467</sup>

There were some considerable rationales that contributed Zardari's misgiving about restoration of judiciary: the restored judiciary might discredit the NRO and may direct reopening of their corruption cases. Generally speaking, the PPP track record with judiciary was not very good such as validation of Zia's regime, Zulfikar Ali Bhutto's execution, and judiciary's role during the 1990s. Likewise, the PML (N) has its own justifications for the contrary view: the court's directions regarding Sharif's exile and permission to return to Pakistan.<sup>468</sup> Further, the PML (N) was hoping that the deposed Chief Justice would favorably decide the cases pertaining to the eligibility of Nawaz and the CM Punjab, in order to hold their respective offices. The PPP's reluctance regarding restoration of the judges compelled the PML (N) to leave the coalition. Taking maximum advantage of the situation, the PML (N) not only sat in the opposition, but firmly aligned with the lawyers' movement. Despite the fact that this movement turned out to be more political, it has created the likelihood of the judges' restoration.

<sup>466</sup> Faisal Siddiqi. *Politics of Constitutionalism*. News on Sunday (June 29, 2008); Amir Wasim & Abid Abbasi. *Zardari, Sharif in Historic Accord: PML-N to Join Govt. at Centre, Judges' Restoration in 30 Days*. Dawn News (March 10, 2008).

<sup>467</sup> Kalhan, Anil. "Constitution and Extraconstitutional: Colonial Emergency Regimes in Postcolonial India and Pakistan." (2010):56-57.

<sup>468</sup> PML (N) v. Federation of Pakistan, PLD 59 (SC 2007)

In this regime shift, the conflict between two political parties gradually intensified and further deteriorated the democratic transition. Generally speaking, the coalition commitment towards the restoration of judiciary reflected spirit of the Charter of Democracy, to work with mutual cooperation, in order to establish and strengthen foundation for constitutionalism and civilian government. The NRO was considered the byproduct of Musharraf's arrangements with the PPP, but the latter emerged and turned out unexpectedly with a different approach. The reconciliation registered military support in favour of the PPP for political gains.

In the 1990s, both the PML (N) and the PPP governments have experienced the same military support at the cost of their own strength. As evident from the fragile civilian governments of the 1990s, Pakistan's representative institutions have been facing entrenched influence from military. Unlike the past, judiciary was now motivated and was committed to ensure its autonomy not only from military, but also from the representative government. In like circumstances, the government was compelled to impose constraints on judiciary as the former was not only aware of the latter's influence but was also aware of military's entrenched powers after the elections.<sup>469</sup>

Prior to his resignation, Musharraf was not only supported by military, but also had the constitutional authority to dissolve Parliament, which he considered to exercise to prevent his impeachment.<sup>470</sup> Keeping in view its interest in alignment with military, the PPP government emerged in pragmatism while dealing both military and judiciary. The government aimed to restore judges while preserving the constrained

<sup>469</sup> Declan Walsh, *Pakistan's President Asif Ali Zardari 'Prepared for Assassination'*, *Guardian* (December 1, 2010): 8.

<sup>470</sup> Kathan, Anil. "Gray Zone'Constitutionalism and the Dilemma of Judicial Independence in Pakistan." (2013):58-59.

status of judiciary as inherited from Musharraf's regime: vulnerable and dependant.<sup>471</sup> The government smartly and systematically played its cards. Initially, the government increased the number of judges from sixteen to twenty-nine, in order to place its stamp on the composition of the court.<sup>472</sup>

In the second phase, the government intended to restore the deposed judges but with limited authority so gradually return the ousted judges to the bench. In this process of restoration, the judges were not reinstated rather reappointed by taking new oaths of their offices. The government continued with this process through selective strategy. In order to avoid the reinstatement of the Chief Justice, the government had not made any changes with the PCO judges, particularly, Dogra's status as Chief Justice.<sup>473</sup> Last but not least, the government also proposed constitutional amendments for the restoration of the deposed judges and for rejection of their extraconstitutional actions. The government was committed to circumscribe judicial autonomy by various means: executive control in their appointment, term of their office, and removal.<sup>474</sup>

Despite the fact that this strategy of amendment to the constitution appeared to have narrowed down the clash with reference to judicial autonomy, but in reality it had adversely affected constitutional order after formation of the coalition government. The proposed amendment package revealed the government strategy not to fully endorse Musharraf's extraconstitutional actions but was committed to uphold and validate reconstituted and subordinate judiciary. The PPP's government was

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<sup>471</sup> Faisal Saddiqi, *Politics of Legal Absurdities*, *Politics of Legal Absurdities*, Sunday News ( Sep. 28, 2008).

<sup>472</sup> Raja Asghar, Assembly Passes First Budget, Expands SC, Dawn (June 23, 2008).

<sup>473</sup> Faisal Saddiqi, *Politics of Legal Absurdities*, *Politics of Legal Absurdities*, Sunday News ( Sep. 28, 2008)

<sup>474</sup> Khan, Hamid. *Constitutional and political history of Pakistan*. 2<sup>nd</sup> ed. (Oxford University Press, USA, 2009): 718-19;

ready to confirm extraconstitutional jurisprudence whereby emergency was imposed and validated, and was ready to impose more constraints on the judiciary. This strategy, however, divided the coalition and consequently the PML (N) joined lawyers' movement. The clashes regarding the restoration of the judiciary turned into political crisis.

In February 2009, the PCO Court declared *Sharif* ineligible to hold elected offices. Followed by the Court decision, the then President of Pakistan, *Asif Ali Zardari*, dismissed the PML(N) provincial government at Punjab and proclaimed direct Federal Rule. The PML (N) government significantly materialized the lawyers' movement, in order to restore their provincial government. In conjunction with the lawyers' movement, the PML (N) government responded with massive demonstrations, which eventually compelled the President not only to restore the provincial government of the PML (N), but had to reinstate *Iftikhar Chaudhry* as the Chief Justice after *Dogar*'s retirement. Even after the restoration of judiciary, the impasse between the Constitution and the extraconstitution remained unresolved. Nevertheless, the settlement of this conflict empowered both Parliament and the judiciary to make sincere efforts and take bold steps to streamline the democratic transition: prevailing constitutionalism over extra-constitutionalism. Besides empowering both the institutions, this resolution simultaneously embarked upon a reconfigured and intensified conflict between them.<sup>475</sup>

### **5.1.1. The Evolution of Judicial Autonomy - a Step Forward**

With the reinstatement of the Chief Justice, the Court initiated reasserting its authority for resuming a powerful position not only as a custodian of

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<sup>475</sup> Kalhan, Anil. "Gray Zone Constitutionalism and the Dilemma of Judicial Independence in Pakistan." (2013):61.

constitutionalism, but also an ultimate arbiter for deciding political controversies.<sup>476</sup> As discussed in the previous Chapter that after the restoration of *de jure* judiciary in March 2009, judiciary not only affirmed its autonomy from military, but also from Parliament. The Supreme Court, in number of cases, asserted its autonomy from the civilian government more firmly than it did in military regimes. In deviation from its previous jurisprudence, where the Court openly upheld military rule, the Court reinforced military's extraconstitutional discourse at the expense of the civilian government.<sup>477</sup>

In its earlier two decisions, the Court while validating Sharif's political status for holding elected office, indirectly narrowed down Musharraf's extraconstitutional edifice. Nevertheless, the court, in May 2009, overturned its earlier judgments and disqualified Sharif from holding elected office.<sup>478</sup> Going further, in July 2009, the Court vacated Sharif's conviction of 2000 for hijacking Musharraf's commercial flight.<sup>479</sup> In this case the Court entirely changed its earlier stance regarding extraconstitutional jurisprudence of necessity with that of the principle of necessity, in order to safeguard constitutionalism. The Court while considering public safety and tranquility declared that the civil aviation law justified Sharif to stop Musharraf's return to Pakistan, in order to avoid his coup.<sup>480</sup>

In another landmark case<sup>481</sup>, the Court invalidated Musharraf's legacy of proclamation of emergency, the PCO, Constitutional Amendments, other laws, and

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<sup>476</sup> Hirschi, Ran. "The new constitutionalism and the judicialization of pure politics worldwide." *Fordham L. Rev.* 75 (2006).

<sup>477</sup> Kennedy, Charles H. "8 The judicialization of politics in Pakistan." *The Judicialization of Politics in Asia* 12 (2012): 151-58.

<sup>478</sup> *Federation of Pakistan v. Muhammad Nawaz Sharif*, PLD 61 (SC 2009): 644.

<sup>479</sup> Rashid, Ahmed. "Descent into Chaos: The US and the disaster in Pakistan." *Afghanistan, and Central Asia, Barcelona, Ediciones Península* (2009): 47.

<sup>480</sup> *Federation of Pakistan v. Muhammad Nawaz Sharif*, PLD 61 (SC 2009): 841, 847-48.

<sup>481</sup> *Sindh High Court Bar Association v. Federation of Pakistan*, PLD 61 (SC 2009): 879.

Musharraf's actions were declared unconstitutional and *ab initio* void.<sup>482</sup> The Court further observed as Parliament has not endorsed Musharraf's extraconstitutional laws and actions, such laws and actions cannot be provided any legal effect.<sup>483</sup> This judgment not only reinstated court's composition to its pre-emergency position, but also wiped out the PPP's strategy regarding re-appointment of the selective judges. The Court also invalidated all notifications regarding reappointment of judges and deemed that those judges had never been terminated.

The Court while invalidating judges' appointment between 2007- 2009 held that office of the Chief Justice had never been vacant; hence *Dogar*'s appointment was invalid. The court observed that these appointments were not made in consultation with the Chief Justice, which was a constitutional requirement for the appointment of the superior courts' judges. The law increasing judges of the Supreme Court was also invalidated on technical grounds in the legislative process and declared it against judicial autonomy. The judges who were already serving in judiciary before taking oath under the PCO-II were reversed to their original positions.<sup>484</sup> Despite the fact that Iftikhar Chaudhry along with other judges who had not only taken oath under PCO-I, but also validated Musharraf's takeover and extraconstitutional actions remained silent about their own legal status.

While considering various aspects of this judicial activism, these cases may be considered as the court's efforts for making its own constitutional order. The court not only renounced extraconstitutional actions, which were previously justified on the basis of state necessity, but also awarded sanctions against individual judges who facilitated and validated Musharraf's regime. Simultaneously, the court also contended its own independence from the representative government, and formally

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<sup>482</sup> Ibid.

<sup>483</sup> Ibid. p. 967.

<sup>484</sup> Ibid. p. 960.

asserted its role as an arbiter for deciding political controversies.<sup>485</sup> The court also replaced political settlement in favour of its own resolution. The court further extended its authority to orders and judgments made by the PCO judges, validated 2008 elections, despite the fact they were held partially under extraconstitutional patronage.<sup>486</sup>

The Court also invalidated Constitutional Amendments, which provided perpetual legal effects to some Ordinances such as the NRO. The Court after providing an opportunity to Parliament for deciding its fate to invalidated the NRO as a *mala fide* effort for facilitating corruption.<sup>487</sup> The court's decision was an affirmation of its independence from Military as well as the civilian rule, which created prospects of controversies among state organs. In December 2009, this conflict openly erupted when the NRO was declared unconstitutional. The Court directed the government to reinstitute all cases against politicians including President Zardari. The Court invalidated the Ordinance on the ground of inequality as it has capriciously illustrated the categories of individuals seeking its protection. The court declared the Ordinance discriminatory as it infringed right of equality and was inconsistent with other constitutional provisions.<sup>488</sup>

In the instance case, the Court replaced its own resolution with a political settlement agreed upon between *Musharraf* and the PPP government. The Court contemplated its resolution on legal conditions, but those terms were not less political in nature. The court justified conclusion of the case in political terms that the NRO failed to serve public interest rather it was the consequence of a deal between two

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<sup>485</sup> Remus, Dana A. "The Institutional Politics of Federal Judicial Conduct Regulation." *Yale L. & Pol'y Rev.* 31 (2012).

<sup>486</sup> *Sindh High Court Bar Association v. Federation of Pakistan*, PLD 61 (SC 2009): 1200-6.

<sup>487</sup> *Ibid.* p.1203-05

<sup>488</sup> *Ibid.*

individuals, which was meant to facilitate each other.<sup>489</sup> The court briefly discussed the significance of prosecuting politicians who were involved in corruption, devoting particular attention to *Zardari*, and further directed the government for writing Swiss authorities to obtain their assistance, in order to pursue corruption cases against him.

Lastly, the court declared the NRO contrary to constitutional provisions, which required parliamentarians to be honest, righteous, and ameen.<sup>490</sup> Moreover, this Ordinance was declared contrary to the integrity of the elected politicians, and same adopted as an instrument by Military to control civilian rule.<sup>491</sup> This decision was less motivated by principles of equality and non-arbitrariness, and more on corruption and criticism to the moral values of politicians. Judiciary not only assigned itself a role for resolving political issues, but considered itself as an arbiter of political morality and integrity. This role of judiciary was more identical with the military's self-conception and its antidemocratic legitimating discourse.<sup>492</sup> Generally speaking, Judiciary and Military may share common standards and assumption about politics.<sup>493</sup> Later on, when the government resisted complying with the Court's directions of writing Swiss authorities against *Zardari*, the court's self-conception of autonomy increased to the extent of Prime Minister's dismissal.<sup>494</sup>

In the fourth case<sup>495</sup>, the Court was inclined to represent its role as an ultimate arbitrator of political morality and integrity. For some ulterior motives, *Musharraf* required legislators to hold university degree. Notably, with overall 35 percent literacy rate, only about 1.6 percent people in Pakistan are having graduate degree.

<sup>489</sup> Dr. Mubashir Hasan v. Federation of Pakistan, PLD 265 (SC 2010): 352-53.

<sup>490</sup> Article 62, 63 of the Constitution of Pakistan, 1973.

<sup>491</sup> Ibid. p. 422-23, 437-40.

<sup>492</sup> Shambayati, Hootan. "Courts in semi-democratic/authoritarian regimes: The judicialization of Turkish (and Iranian) politics." *rule by law: the politics of courts in authoritarian regimes* 283 (2008):286.

<sup>493</sup> Ibid.

<sup>494</sup> Kalhan, Anil. "Gray Zone'Constitutionalism and the Dilemma of Judicial Independence in Pakistan." (2013):66.

<sup>495</sup> Muhammad Nasir Mahmood v. Federation of Pakistan, PLD 61 (SC 2009): 109, 177.

This requisite would not only deprive a substantial number of people to contest election, but would ultimately institutionalize anti-democratic discourse of Military, which was used as a tool for political manipulation. The Court unconstitutionally maintained university degree requirements. Nevertheless, this order was overruled by the PCO court in 2008 for its inconsistency with constitutional rights of association and equality.<sup>496</sup>

In order to meet the prerequisite of holding university degree for holding elected office, many politicians wrongly alleged to have university degrees. Despite the fact that the PCO court invalidated the degree requirement for holding elective office, Chief Justice took cognizance regarding false statements. The Court declared it corrupt practice and directed the Election Commission of Pakistan to probe into the matter and award sanctions to those who made false claims.<sup>497</sup> Once again, the court strengthened extraconstitutional discourse and expanded military's authority at the cost of the civilian institutions.<sup>498</sup>

The above instances articulated how judiciary asserted its autonomy from Military Regimes as well as from the civilian government. While deciding the fate of NRO, the Court also challenged the authority of the democratic government including the Prime Minister and the President, which the government considered direct attacked on its sovereignty. In order to ensure its supremacy, the government decided to put certain limitations on Judiciary by various means such as judges' appointment and their incentives.

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<sup>496</sup> Ibid.

<sup>497</sup> Muhammad Rizwan Gill v. Nadia Aziz, PLD 828 (SC 2010); Kennedy, Charles H. "8 The judicialization of politics in Pakistan." *The Judicialization of Politics in Asia* 12 (2012): 153-54.

<sup>498</sup> Kalhan, Anil. "Gray Zone'Constitutionalism and the Dilemma of Judicial Independence in Pakistan." (2013):67.

## **5.2. JUDICIAL APPOINTMENTS AND CONSTITUTIONAL AMENDMENTS**

Both Judiciary and Parliament were committed to roll back entrenched Military, its transformative preservation, and at the same time both institutions sought to empower themselves. After its restoration, Judiciary not only challenged Military's extraconstitutional discourse, but also sought autonomy from the government. The pursuit of this judicial autonomy led to the self-conception of judiciary that it was the sole arbiter of resolving disputes of political nature, including morality and integrity of the politicians. In response, Parliament brought about certain Constitutional Amendments, which were meant to ensure the supremacy of Parliament and to maintain a reasonable balance between judicial autonomy and its constraints.

Generally, these Constitutional Amendments had three-pronged objectives: firstly, to eliminate extraconstitutional actions and further military intervention. Secondly, to impose at least modest constraints the judiciary, in order to discourage excessive judicial interference in the executive matters. Thirdly, to provide some constitutional safeguards against judiciary so that in future it may not validate extraconstitutional actions. Prior to the Eighteenth Amendment, Judiciary was clearly dominating the judges' appointment process. In the Superior Judiciary, the appointment, tenure, and removal of judges were the only constitutional means of controlling judiciary. Nevertheless, this process lacked any reasonable check and was within the exclusive control of Judiciary.

The government, through the 18<sup>th</sup> Constitutional Amendment, strived to change the traditional mechanism of judicial appointments and gave Parliament a role in the judges' appointment. Judiciary, however, challenged the provisions of the 18<sup>th</sup> Amendment pertaining to judges' appointment and directed the government to

reconsider the amendment in the light of the court's suggestions. However, the subsequent judicial and legislative developments after 18<sup>th</sup> Amendment diminished Parliament's role and can be referred to a transition to the traditional pre-18<sup>th</sup> Amendment position.

### 5.2.1. The Institutionalism: the Mechanism of Judges' Appointment

Judiciary's assertion of authority for conferring legitimacy or withdrawing it from the representative government has became a legal and political tool in the hands of judiciary and can override public mandate as a constitutional source of legitimacy. In recent years, institutionalism has increasingly characterized judiciary's functioning in terms of preserving and asserting its authority. In the process of dispensation of justice in the dynamic conflicts, judiciary not only safeguarded its own institutional efficacy, but its legal and moral legitimacy.<sup>499</sup> Generally speaking, the court verdict directly or indirectly contributes to the law-making process, which is the primary objective of Parliament. In order to keep this authority intact, Parliament seeks to restrain the courts' authority of reconstructing the legal edifice through case law, and seeks to keep it exclusively for itself.<sup>500</sup>

This power struggle entails institutional conflicts. This tendency of power struggle between state organs also effectuated courts' functioning and turned constitutionalism as a matter of institutional design rather than social consensus.<sup>501</sup> Interestingly, the judicial activism is not only courts' assertion for enactment of the constitutional provisions, rather it is the outcome of bad-governance and inefficiency of the executive to perform its functions. The judges' appointment remained a

<sup>499</sup> Sweet, Alec Stone. "Judicialization and the Construction of Governance." *Comparative Political Studies* 32, no. 2 (1999): 155-56.

<sup>500</sup> Ibid. p161.

<sup>501</sup> Mehta, Pratap Bhanu. "India's judiciary: The promise of uncertainty." *The Supreme Court Versus the Constitution: A Challenge to Federalism* (2006): 170-73.

considerable issue in terms of its institutional autonomy, which is politicized throughout the constitutional history of Pakistan. There are instances regarding arbitrary appointments, promotions, transfers, and suspensions of judges by excluding them to take oath under the PCO.

Before the 18<sup>th</sup> Amendment, the appointments of judges were at the mercy of individuals since there was no institutional mechanism for judges' appointments. The following instances elaborate that how an individual manipulated the appointment process without observing constitutional norms. In the 1990s, the courts strived to take back matters regarding judges' appointment and other related matters in its hands. In this regard, *Al-Jihad Trust Case*<sup>502</sup> turned out to be a landmark case in the context of judges' appointment with reference to judicial autonomy. The Court held that the opinion of the Chief Justice has to be binding on the government and showed its commitment to the security of tenure for the superior judiciary.<sup>503</sup> The Court also curtailed the President's discretionary authority in the appointment process, making it entirely ineffectual. The court declared that the President is bound by the Chief Justice's recommendations, and in case of any deviation the latter must provide justiciable reasons.<sup>504</sup>

In February 2010, the Court took cognizance of the Presidential order pertaining to the appointment of a judge of the Supreme Court and an Acting Chief Justice of the Lahore High Court. The Court while suspending the appointments held that notification was not complied with the Articles 177 and 260 of the Constitution whereby the President was bound by the Chief Justice's recommendations.<sup>505</sup> On the

<sup>502</sup> *Al-Jihad Trust v. Federation of Pakistan*, PLD 324 (SC 1996).

<sup>503</sup> Shah, Nasim Hasan, "Judiciary in Pakistan: A quest for independence," *Pakistan 1997*, eds., Baxter, Craig and Charles Kennedy, 61-78. (Boulder: West view Press 1998): 62-63.

<sup>504</sup> Saroop Ijaz, *Judicial Appointments in Pakistan: Coming Full Circle*, LUMS Law Journal, vol. 1, No. 1 (2014): 87.

<sup>505</sup> Article 177 and 260 of the Constitution of Pakistan, 1973.

other hand, extension of six additional judges of the Lahore and Sindh High Courts by the newly formed Judicial Commission, constituted under the 18<sup>th</sup> Amendment, received critical feedback from legal fraternity and media. These extensions were criticized on the pretext of being contrary to the spirit of *Al-Jihad Trust Case* where the Court decided against the appointment of judges on ad hoc basis.

Similarly, the Parliamentary Committee refused extension to judges in view of the adverse remarks of the Lahore and Sindh High Courts. Nevertheless, the Supreme Court rejected Committee's decision being contrary to the Constitution and directed for the notifications to the judges.<sup>506</sup> In 2009, after the regime shift, the new democratic dispensation put the appointment of the superior courts' judges in a positive track. The 18<sup>th</sup> Amendment<sup>507</sup> introduced an institutional framework for judges' appointments whereby individuals' appointing authority was substituted with the institutions: it replaced the Chief Justice with the Judicial Commission and the President with the Parliamentary Committee.

However, judiciary considered this an encroachment upon its autonomy and directed the government for reconsideration of the said Amendment in view of the court's recommendations: to increase the judges of the Commission from two to four and bound the Committee to give sound reasons for the rejections of the Commission's recommendations and if the same recommendations are reiterated by the Commission without making any changes the appointment would deem to have been confirmed. Ultimately, Parliament adopted 19<sup>th</sup> Amendment<sup>508</sup> and increased the number of judges from two to four in the Commission. After 19<sup>th</sup> Amendment, the court also rejected the Committee's decision, which was tantamount to its virtual

<sup>506</sup> Waseem, Mohammad. "Judging democracy in Pakistan: conflict between the executive and judiciary." *Contemporary South Asia* 20, no. 1 (2012): 25.

<sup>507</sup> Constitution (18<sup>th</sup> Amendment) Act, No. 10 of 2010.

<sup>508</sup> Constitution (Nineteenth Amendment) Act, 2010.

annulment. The court had declared that the appointment of judges is closely associated with the judicial autonomy and ensured judges' strength in the Commission.

Nevertheless, mechanism for external scrutiny of the judges' appointment and their accountability remained unresolved.<sup>509</sup> In past, judiciary used to manipulate and validate extraconstitutional actions. In 2000, Musharraf forced the superior courts' judges to take fresh oath under the PCO so as to strengthened the regime generally and manipulate the upcoming elections particularly. After imposing emergency in 2007, Musharraf required the superior courts' judges to take oath under the PCO-II. However, after Chaudhry's restoration in March 2009, invalidated the PCO-II and thereby dismissed seven out of seventeen judges of the Supreme Court.

### **5.2.2. Judges' Appointment: Pre-Eighteenth Amendment**

Before 18<sup>th</sup> Amendment, judges were appointed by the President in view of the Chief Justice's recommendations. In case of appointment to the High Court, the President had to consider recommendations of the concerned court's Chief Justice, which had to be channelized through the Chief Justice of the Supreme Court and governor of the concerned province. In this process of appointments, the pivotal role rested with the Chief Justice and the Provincial Chief Justices. In *Al-Jehad Trust Case*<sup>510</sup> the court curtailed the executive authority of the President in the judges' appointments. The Court declared that the Chief Justice's recommendations are binding on the President. Where the President departed from the recommendations the same must be followed by justiciable reasons.<sup>511</sup>

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<sup>509</sup> Waseem, Mohammad. "Judging democracy in Pakistan: conflict between the executive and judiciary." *Contemporary South Asia* 20, no. 1 (2012): 25.

<sup>510</sup> *Al-Jihad Trust v. Federation of Pakistan*, PLD 324 (SC 1996)

<sup>511</sup> Saroop Ijaz. *Judicial Appointments in Pakistan: Coming Full Circle*. LUMS Law Journal, vol. 1.

### 5.2.3. The Eighteenth Amendment: Reconfiguration of Institutional Structure

Immediately after the NRO case, there were rumors regarding Military takeover. Nevertheless, Parliament responded to the situation with more maturity and effectiveness than ever.<sup>512</sup> The year-long conflict between the coalition partners culminated with the adoption of Eighteenth Amendment to the Constitution in April 2010. This Amendment implemented most of the Charter of Democracy and was an exceptional package, which brought about significant constitutional changes: upholding civilian rule, empowering the Prime Minister over the President, devolution of power and provincial autonomy, and reconfiguration of equilibrium between the judicial autonomy and its constraints, with reference to the appointment process.<sup>513</sup> The 18<sup>th</sup> Amendment addressed the constitutional distortion of *Zia* and *Musharraf*, who incorporated 8<sup>th</sup> and 17<sup>th</sup> Constitutional Amendments of 1985 and 2003 respectively.

Both these Amendments were meant to validate Military Regimes, to entrench its transformative preservation, and to provide constitutional shield to their extraconstitutional actions. The 18<sup>th</sup> Amendment not only strengthened representative institutions, but also replaced the President's executive authority with that of the Prime Minister, ensured maximum provincial autonomy, and institutionalized judges' appointment. In order to prevent the Court from legalizing extraconstitutional actions and military regimes in future, the government was committed to regulate judicial autonomy so Article 6 of the Constitution was modified. The government also

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512 No. 1 (2014): 87.

513 Fruman, Sheila. *Will the Long March to Democracy in Pakistan Finally Succeed?*. (US Institute of Peace, 2011): 21-22.

513 Colin Cookman. *The 18th Amendment and Pakistan's Political Transitions*, center for AM, Progress. (April 19, 2010).

transformed the judges' appointment process from individuals to institutionalized framework.<sup>514</sup>

This constitutional package was prepared by the Parliamentary Committee on Constitutional Reforms (PCCR), which was comprised of twenty-six members having representation of all the parties.<sup>515</sup> The PCCR achieved exceptional political consensus.<sup>516</sup> The PCCR's members unanimously presented the 18<sup>th</sup> Amendment, which Parliament passed without any dissenting vote.<sup>517</sup> The Court while reasserting civilian supremacy, repealed extraconstitutional amendments after Musharraf's 1999 coup for these Amendments were passed without lawful authority.<sup>518</sup> In order to maintain perpetual status of the supremacy of the Constitution, the Amendment also expanded the definition of high treason to the suspension, holding the Constitution in abeyance, and prevented the superior judiciary to validate such actions.<sup>519</sup> This clause seems to have closed judicial license to register and validate extraconstitutional actions and military regimes.

The Amendment package significantly contributed in putting an end to military's transformative preservation. The Amendment also restored the supremacy of Parliament, placing the Prime Minister's selection in the hands of Parliament and transferring of the President's executive authority to the Prime Minister, making the latter more powerful.<sup>520</sup> The Amendment also repealed Article 58 (2) (b) and

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<sup>514</sup> Khalid, Iram. "Role of Judiciary in the Evolution of Democracy in Pakistan." *Journal of Political Studies* 19, no. 2 (2012): 135-36.

<sup>515</sup> Adeney, Katharine. "A step towards inclusive federalism in Pakistan? The politics of the 18th amendment." *Publius: The Journal of Federalism* 42, no. 4 (2012): 539-565.

<sup>516</sup> Gazdar, Haris. "Democracy in Pakistan: The chasm." *Economic and Political Weekly* (2010): 10.

<sup>517</sup> Kalhan, Amil. "'Gray Zone' Constitutionalism and the Dilemma of Judicial Independence in Pakistan." (2013): 68.

<sup>518</sup> Constitution (18<sup>th</sup> Amendment) Act, No. 10 of 2010.

<sup>519</sup> Article 6 (amended) of the Constitution of Pakistan, 1973.

<sup>520</sup> Amending Articles 46, 48, 89, 90, 91, 99, 129, 123, 101, 213, 242, 243, and adding Article 175A to the Constitution of Pakistan, 1973.

consequently ousted discretionary authority of the President to dissolve assembly.<sup>521</sup> While diminishing the President's legislative role, the Amendment also eliminated constraints on lawmaking authority of Parliament.<sup>522</sup> The Amendment incorporated provisions, increasing the number of fundamental rights, which were not previously guaranteed.<sup>523</sup> The Amendment package further improved provincial autonomy, modified formula for distribution of national revenue, and entrusted greater provincial control over national resources.<sup>524</sup>

Finally, the amendment introduced a new system for judicial appointments.<sup>525</sup> The court while relying on the Indian precedents held that during the consultation process of the judges' appointment, executive is bound by the Chief Justice's recommendations, which was criticized both in India and Pakistan for lack of transparency. In this pattern of appointments, exclusive authority vests with the Chief Justice and the President without active involvement of Parliament, legal fraternity, and general public.<sup>526</sup> In Pakistan, the Supreme Court's assertion, in the consultation process regarding Chief Justice's dominance secured the judiciary even greater judicial autonomy than in India. Unlike India, in Pakistan judges' removal is constitutionally assign to the Supreme Judicial Council.<sup>527</sup>

Based on this criticism, a transparent and institutionalized appointment system was proposed to ensure judicial fairness in judges' appointment and maintaining a

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<sup>521</sup> Repealing Article 58(2)(b) – (C) of the Constitution of Pakistan, 1973.

<sup>522</sup> Kalhan, Anil. "Gray Zone' Constitutionalism and the Dilemma of Judicial Independence in Pakistan." (2013): 69.

<sup>523</sup> Adding Article 10A: right to fair trial, Article 19A: right to information, and Article 25A: right to education. In order to improve Pakistan's international human rights' compliance, the government also ratified International Covenants such as International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Covenant on Civil and Political Rights (ICCPR), and Convention Against Torture (CAT).

<sup>524</sup> Amending Articles 157, 160, 172 of the Constitution of Pakistan, 1973.

<sup>525</sup> Adding Article 175A to the Constitution of Pakistan, 1973.

<sup>526</sup> Osama Siddique, *Judicial Appointments and Accountability: A Flawed Debate*, Friday Times, (March, 12, 2010).

<sup>527</sup> Article 209 of the Constitution of Pakistan, 1973 and Article 124(4) and Article 217(1) of the Constitution of India, 1950.

reasonable control on the judiciary. Unlike the traditional system where the Chief Justice and the President had exclusive authority in judges' appointments, the 18<sup>th</sup> Amendment placed modest restraints on judicial sovereignty by transforming the individuals' authority to the institutions: the judicial Commission and the Parliamentary Committee.

As per the novel system of appointments, the nominations for the appointment of the superior courts' judges are made by the Commission, chaired by the Chief Justice, having representation from judiciary, executive, and Bar Association as its members. The Commission nominates one nominee for each vacancy to the Committee, which is comprised of eight members having equal representation from the ruling and opposition parties. In the whole appointment process, the Committee has very limited scope: it may reject a nomination within fourteen days. Otherwise, the nominee will deem to have been confirmed.<sup>528</sup> The Court, however, considered this amendment against judicial autonomy. Hence, the Court referred back the amendment to the government along with its reservations and recommendations, which the government has complied with in the form of the Nineteenth Amendment to the Constitution.<sup>529</sup>

Collectively, both the Amendment and the PCO judges' case addressed the impasse of constitutional order, followed by Musharraf regime. In the former case, the court not only annulled the emergency and other extraconstitutional actions of *Musharraf's* regime, but also repudiated jurisprudential basis used for the justification of military intervention for decades. In the latter case, Parliament reversed the legal edifice which was the outcome of 1999 coup and an eye-opener to challenge entrenched military and its affiliated interests. Both these institutional developments,

<sup>528</sup> Kalhan, Anil. "'Gray Zone' Constitutionalism and the Dilemma of Judicial Independence in Pakistan." (2013): 71.

<sup>529</sup> Constitution (19<sup>th</sup> Amendment) Act, 2010, No. 1 of 2011.

challenging the tyrannical regimes, extraconstitutional actions, and transformative preservation, significantly contributed in reconfiguration of Pakistan's political and institutional patterns. Structurally, democracy was much stronger than it had ever been. Despite its instability and rumors regarding the apprehension of military's takeover after invalidation of the NRO by the Court, a successful transition of democratic order was made.<sup>530</sup>

Nevertheless, the government's initiative towards institutional reforms in the form of the 18<sup>th</sup> Amendment received harsh response from some segments of the legal community, who considered this Amendment in contravention of the basic features of the Constitution. The main controversies in the Amendment were regarding the composition of the Judicial Commission, the Committee's ultimate authority to decide judges' appointment, and the Supreme Court's jurisdiction. Indian precedents regarding the basic structure doctrine were referred, which divided legal opinion into two categories: one side endorses basic structure doctrine and asserted that even the legislature has no authority to modify basic structure of the Constitution. The other side argues that the court has no authority to challenge a constitutional amendment.

#### **5.2.4. The Nineteenth Amendment : Back to the Past**

The 18<sup>th</sup> Constitutional Amendment was challenged in the Court on the pretext that provisions relating to judges' appointment infringed upon judicial autonomy. The Court admitted the petition for hearing before the full bench.<sup>531</sup> The Courts' sitting in judgments over Constitutional Amendment was an unprecedented move. The Court instead of passing a definitive order, referred the matter back to Parliament, presented some minimum standards of restraints, and offered advice how to modify the

<sup>530</sup> Cyril Almedeida. *A More Complicated Script*. Dawn (December, 30, 2011); Zaidi, S. Akbar. "Is Pakistan on Collapsing?" *Economic and Political Weekly* (2011): 16-20.

<sup>531</sup> Nadeem Ahmad v. Federation of Pakistan, PLD 1165 (SC 2010).

Amendment in order to make it consistent with the Constitution. The Court made it clear to strike down the provisions relating to judges' appointment if Parliament could not change the provisions in the light of the former's recommendations.

The Court suggested two main changes: firstly, to enhance the Commission's judges from two to four. Secondly, where the Committee rejects the Commission's nomination, the former shall refer back the matter to the latter for reconsideration coupled with sound reasons for rejections. If the letter reiterates its previous recommendations, the former is bound to accept the recommendations and the President will bound to make the appointments accordingly. There were some implications of these recommendations: judges overwhelming majority in the Commission, its overruling authority over the Committee was a step back towards pre-18<sup>th</sup> Amendment scenario. As per directions of the Court, the government amended the 18<sup>th</sup> Amendment in the light of the Court's suggestions and adopted 19<sup>th</sup> Constitutional Amendment.

The court going further, in another case<sup>532</sup> held that the Commission is the right forum to evaluate a judges' caliber and legal wisdom and the Committee can only reject the nomination of the Commission by presenting strong and justiciable reasons, which shows the Commission's ultimate control over the judges' appointments. Subsequently, the Commission, by virtue of Article 175A (4)<sup>533</sup>, also formulated the Judicial Commission of Pakistan Rules (JCPR), 2010. According to Rule 3 (1) of the JCPR, vacancy in the Superior Courts shall be initiated by the Chief Justice through nomination in the Commission. The JCPR vested power of nomination in the Chief Justice of Pakistan making his role stronger both inside and outside the Commission.

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<sup>532</sup> *Munir Hussain Bhatti v. Federation of Pakistan*, PLD 407 (SC 2011)

<sup>533</sup> Article 175A of the Constitution of Pakistan, 1973.

In 2013, the Chief Justice of Pakistan in exercise of his nomination powers under the JCPR, allegedly superseded the senior judge, *Justice Riaz A. Khan*, and appointed his junior judge as CJ of IHC.<sup>534</sup> Despite the fact that both these judges were appointed to the High Court on the same day, but in principle the judge older in age was deemed to be senior. In the preceding cases, the Court strengthened the role of the CJP and the Commission in the judges' appointment process and rendered the Committee almost redundant. The Court undone the progress made by Parliament. Hypothetically, in the appointment process, the CJP is just a member of the Commission with one vote. Nevertheless, after introduction of the JCPR, the Chief Justice has sole authority to initiate or propose nomination for the appointment, which may be confirmed or rejected by the Commission.<sup>535</sup>

Before the 18<sup>th</sup> and the 19<sup>th</sup> Amendments, the Chief Justice had inordinate authority in judges' appointments. Nevertheless, due to political dynamics and frequent regime shifts, this discretion was barely exercised impartially. After the restoration of judiciary in March 2009, the judiciary had taken unprecedented actions. In judicial fabric, the role of the Chief Justice has been transformed from judiciary's theoretical head to practically unanimous leader. In *Justice Hasnat Ahmed Khan v. Federation of Pakistan*<sup>536</sup> the Court while deciding about the legality of the PCO judges, removed over one hundred judges of the Superior Courts. Despite the fact that reference to the Supreme Judicial Council is the only constitutional mechanism for removal of the judges.<sup>537</sup>

The removal of judges by the Court itself consequently defunct the Supreme Judicial Council in context of its exclusive authority to hold judges accountable.

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<sup>534</sup> Reference No. 01 of 2012, PLD 279 (SC 2013).

<sup>535</sup> Saroop Ijaz, *Judicial Appointments in Pakistan: Coming Full Circle*, LUMS Law Journal, vol. 1, No. 1 (2014); 92.

<sup>536</sup> *Justice Hasnat Ahmed Khan v. Federation of Pakistan*, PLD 680 (SC 2011).

<sup>537</sup> Article 209 of the Constitution of Pakistan, 1973.

Being part of a broader institutional struggle of democratic transition, the government was committed to impose at least modest control over judges' appointment and strived to be an active participant in judicial appointments. Nevertheless, the Court reversed all those efforts and re-empowered the Chief Justice in the appointment process. The opponents of this judicial activism highlights two main adverse impacts: firstly, the Court's negation to the basic idea of constitutional amendment further weakened the fragile representative institutions and consolidation of democracy. Secondly, the decision-making flowing from an individual to an institution seems to have been compromised the whole idea of checks and balances.<sup>538</sup>

The critics also believe that after restoration of judiciary, the country stood at the junction of judicialization of politics – a situation where laws are being served by judiciary to achieve political ends. On the other hand, politicians are stressing on legal imagination of contestants of power. In this whole transition, the court's functional dynamics based on some uncertain variables such as the personification of institutional powers by the Chief Justice, which the court could not translate into a sound institutional policy pertaining to other state organs. The whole episode of transition which started from the 18<sup>th</sup> amendment and progressed through judicial directions projects judiciary's institutional autonomy for exercising a veto power over judges' appointment. The underlying objective was to safeguard judiciary from an external scrutiny at the entrance point of appointments and immunity from the accountability at the other end. The newly constituted Court was inclined towards selective adjudication.<sup>539</sup> Instead of right based discourse, the court followed political approach of upholding certain nature of cases and avoiding others.

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<sup>538</sup> Sareen Ijaz, *Judicial Appointments in Pakistan: Coming Full Circle*, LUMS Law Journal, vol. 1, No. 1 (2014): 93-95.

<sup>539</sup> Waseem, Mohammad. "Judging democracy in Pakistan: conflict between the executive and judiciary." *Contemporary South Asia* 20, no. 1 (2012): 29.

Moreover, the court's overseeing authority to check executive's performance not only weakened the fragile democratic system, but also flourished a cost to the institutional reform of judiciary itself. After unnecessary expansion of the *suo motu* authority, public interest litigations have significantly been multiplied in the Superior Courts. Similarly, drastic steps of diminishing judges of the Superior Courts through a single verdict and deviation from Musharraf's accountability for a series of extraconstitutional actions, which could have been a potential deterrent for Military. Such steps adversely affect the consolidation of democracy.<sup>540</sup>

In this judicial transition, the court remained preoccupied with the expansion of external boundaries of the court system, but it has not succeeded in formulating and implementing the internal agenda to overcome procedural formalities and legal black holes in dispensation of justice. The transformation of judicial activism remained restricted due to its retrospective rather than prospective attitude: fighting the last dictator and not taking any precautions against the future one.<sup>541</sup> The invalidation of the NRO, referral of the 18<sup>th</sup> Amendment to Parliament for reconsideration in the light of its suggestions, and rejection of the Committee's recommendations regarding judges' appointment that amounted to the annulment of the 19<sup>th</sup> Amendment. The court further complicated the institutional working of state organs. The court faced a moral predicament in dealing with the judges who served the regime. The Chief Justice who pushed the PCO-II judges out of the office himself had taken oath under the PCO-I and had validated Musharraf's takeover in 2000 on the pretext of necessity doctrine, validated referendum as well as the 17<sup>th</sup> Amendment in 2003, and retention of two offices in 2005.

<sup>540</sup> Gazdar, Haris. "Judicial activism vs democratic consolidation in Pakistan." *Economic and Political Weekly* 44, no. 32 (2009): 10-11.

<sup>541</sup> Waseem, Mohammad. "Judging democracy in Pakistan: conflict between the executive and judiciary." *Contemporary South Asia* 20, no. 1 (2012): 29.

### **5.3. BALANCING AND REBALANCING JUDICIAL AUTONOMY**

With successful elimination of Musharraf's extraconstitutional regime and restoration of judiciary, judicial activism and its autonomy transformed into a new conflict of judicial independence from the representative institutions. Shortly, this clash dramatically escalated, which created apprehension of military's and its affiliates' involvement in the ongoing confrontation to undermine fragile democratic transition.<sup>542</sup> The implications of these conflicts are vulnerable to institutional disequilibrium, leaving adverse impacts on the democratic transition. Nonetheless, this institutional imbalance is not a constant phenomenon and the state organs would ultimately authenticate their jurisdictional circle, creating prospects of institutional-equilibrium, which would be more productive to the democratic consolidation.

#### **5.3.1. Transplantation of Basic Structure Theory: an Indian Pattern**

Soon after the 18<sup>th</sup> Amendment, the Bar Associations along with individual lawyers challenged the new mechanism of judges' appointment. The Amendment was challenged on the alleged ground of its inconsistency with judicial autonomy being a salient feature of the Constitution. The petitioners contended that the impugned procedure for judges' appointment is beyond the legislature's constitutional mandate and their power to amendment. The petitioners insisted that in the ongoing institutional controversy, judiciary should hold the Indian concept of the basic structure theory.<sup>543</sup>

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<sup>542</sup> Kalhan, Anil. "'Gray Zone' Constitutionalism and the Dilemma of Judicial Independence in Pakistan." (2013): 72.

<sup>543</sup> Mehta, Pratap Bhanu. "The inner conflict of constitutionalism: Judicial review and the basic structure." *India's Living Constitution: Ideas, Practices, Controversies* 179 (2002); Ranachandran, Raju. "The Supreme Court and the basic structure doctrine." *Supreme But Not Infallible: Essays in Honour of the Supreme Court of India* (New Delhi: Oxford University Press, 2000); 107 (2011);

This principle circumscribed parliament's authority to adopt constitutional amendment, which aims to strike down the Indian Constitution's essential feature or otherwise modify its basic structure. The Court in like circumstances can invoke its power of judicial review to invalidate such anti-basic structural constitutional arrangements.<sup>544</sup> In India, this doctrine was first originated in *I.C. Golaknath and Others v State of Punjab*<sup>545</sup> the Court held that any constitutional provision can be amended subject to the condition that it is not making any change to the salient feature of the Constitution. In *Kesavananda Bharathi case*<sup>546</sup> the Court held that even the amending authority must neither destroy nor otherwise damage essential constitutional features.

Even though, the doctrine of basic structure is the settled principle of Indian constitutional law, the Indian Supreme Court has at least five times invoked this doctrine to strike down constitutional amendments.<sup>547</sup> However, the application of doctrine remained subject to substantial controversies. These controversies developed into two competing arguments regarding the basic structure theory: the opponents argue that this doctrine has its foundation on the distrust of the democratic process- a process, which itself is a necessary ingredient of this doctrine. The opponents further argue that the judicial review of a legislative action, achieved through a democratic process by obtaining Parliament's assent, is no more than usurpation of parliamentary sovereignty by judiciary.<sup>548</sup>

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Krishnaswamy, Sudhir. *Democracy and constitutionalism in India: a study of the basic structure doctrine*. Oxford University Press, 2010; Bast, Jürgen. "Democracy and Constitutionalism in India. A Study of the Basic Structure Doctrine." (2011): 273-276.

<sup>544</sup> For instance, in the following cases the Supreme Court of India applied the basic structure doctrine. *Kesavananda Bharati v. State of Kerala* 4 SCC (1973): 225; *Gandhi v. Narain*, AIR 2299 (SC 1973); *Minerva Mills Ltd. v. India*, AIR 1789 (SC 198)

<sup>545</sup> *I.C. Golaknath and Ors v. State of Punjab and Anrs*, AIR 762 (SCR 1967):1643

<sup>546</sup> *Kesavananda Bharati v. State of Kerala* 4 SCC (1973): 225.

<sup>547</sup> Bast, Jürgen, "Democracy and Constitutionalism in India. A Study of the Basic Structure Doctrine." (2011): 273.

<sup>548</sup> Ramachandran, Raju. "The Supreme Court and the basic structure doctrine." *Supreme But Not*

Considering the inconsistent manner in which the Indian courts have elucidated the basic structure, this doctrine seems to have been supplicated for expanding scope of judicial review.<sup>549</sup> However, the proponents argue that Parliament may easily bring about constitutional Amendments as envisaged by the Constitution<sup>550</sup> in pursuit of some political ends, which can adversely impact constitutionalism. So this principle of judicial review, to invalidate constitutional amendment repugnant to the basic structure doctrine, is a legal tool in order to safeguard and preserve democratic constitutionalism and helps protect the Constitution from radical changes.<sup>551</sup> Moreover, the Supreme Court of India while expanding its power of judicial review has considerably constrained itself in exercise of that power.<sup>552</sup>

Unlike India, the Supreme Court of Pakistan's approach towards the basic structure doctrine has been more uncertain. On one hand, the Court has expressly declined to embrace the doctrine. In this regard, *Naqvi* summarized thirty years of precedents where the court uninterrupted rejected this doctrine.<sup>553</sup> *Pakistan Lawyers Forum v. Federation of Pakistan*<sup>554</sup> is the most recently reported case where the court rejected the doctrine. Furthermore, Article 239 (5) – (6)<sup>555</sup> expressly empowers Parliament to amend the Constitution, which cannot be challenged. The court manifested the basic structure doctrine as an essential feature, which includes judicial autonomy. The Court has never invoked its authority to remedy an alleged

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*Infallible: Essays in Honour of the Supreme Court of India* (New Delhi: Oxford University Press, 2000) 107 (2011): 130.

<sup>549</sup> Mehta, Pratap Bhanu. "The inner conflict of constitutionalism: Judicial review and the basic structure." *India's Living Constitution: Ideas, Practices, Controversies* 179 (2002): 200.

<sup>550</sup> Article 239 of the Constitution of Pakistan, 1973; Article 368 of the Constitution of India, 1950.

<sup>551</sup> *Ibid.* 191-96.

<sup>552</sup> Shankar, Shyłashri. "Scaling Justice: India's Supreme Court, Social Rights, and Civil Liberties." *OUP Catalogue* (2009): 17-178.

<sup>553</sup> Faisal H. Naqvi. *Not a New Debate*. Dawn. (April 23, 2010).

<sup>554</sup> *Pakistan Lawyers Forum v. Federation of Pakistan* PLD 57 (SC 2005): 719.

<sup>555</sup> Article 239 (5) – (6) added to the Constitution by virtue of General Zia's Eighth Amendment to the Constitution of Pakistan, 1973.

amendment violating basic feature of the Constitution. Rather, asserted that the remedy lies in political process.<sup>556</sup>

Conversely, the court while relying on principle of constitutional interpretation between conflicting provisions held that constitutional provisions endorsing lesser rights necessarily give way to those having higher rights.<sup>557</sup> In Pakistan, the proponents of basic structure theory argue that the court had established the existence of this doctrine in the 1990s.<sup>558</sup> Nonetheless, Pakistan's legal fraternity expressed little concern towards the resolution to openly recognize the basic structure doctrine, considering its historical role in validation of extraconstitutional actions, which has facilitated military intervention at the expense of civilian government and constitutionalism.<sup>559</sup> Considering implications of the doctrine, frequent regime shifts, and interrupted constitutional developments in Pakistan, it is more challenging for judiciary to differentiate that what constitutional elements should be and what should not be deemed legal ingredients of the doctrine.<sup>560</sup>

The 18<sup>th</sup> Amendment itself elaborates that in view of the prevalent challenges certain changes to the settled constitutional principles are inevitable, which may deviate from the basic structure.<sup>561</sup> It is also observed that Constitutional protection to the basic structure doctrine might result in elevation of the Objectives Resolution, incorporated by Zia through Article 2A as a substantive part of the Constitution, which is embedded with the Islamic principles and used by judiciary as a tool in the

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<sup>556</sup> *Pakistan Lawyers Forum v. Federation of Pakistan* PLD 57 (SC 2005): 763.

<sup>557</sup> Hamid Khan. *Constitutional and political history of Pakistan*. (Oxford University Press, USA, 2005): 636-37

<sup>558</sup> *Al-Jehad Trust v. Federation of Pakistan*, PLD 48 (SC 1996): 324; *Muhammad Khan Achakzai v. Federation of Pakistan*, PLD 49 (SC 1998): 426; *Wukala Mahaz Barai Tahafaz Dastoor v. Federation of Pakistan*, PLD 50 (SC 1998): 1263.

<sup>559</sup> Hamid Khan. *Constitutional and political history of Pakistan*. (Oxford University Press, USA, 2005); Osama Siddique, *Across the Border*. 615 Seminar 52, 53 (2010).

<sup>560</sup> Hamid Khan. *Constitutional and political history of Pakistan*. (Oxford University Press, USA, 2005): 60.

<sup>561</sup> Kalhan, Anil. "Gray Zone' Constitutionalism and the Dilemma of Judicial Independence in Pakistan." (2013): 76.

1990s. Judicial appreciation of the doctrine and constitutionality of the Objectives Resolution potentially create a risk of over-authoritative and inexplicable judiciary.<sup>562</sup>

### **5.3.2. Judicial Autonomy: Supreme Court's Viewpoint**

After conclusion of the arguments in the 18<sup>th</sup> Amendment cases, judges responded passionately to the implementation of the basic structure doctrine, in order to link judicial autonomy with the amendment. As depicted by *Justice Ramday*, judiciary in Pakistan is passing through an evolution where it has started taking account of the basic structure doctrine.<sup>563</sup> Judges directly contested the notion regarding the unfettered authority of the legislature to amend constitutional provisions. Despite this fact, Parliament has constitutional authority to amend the Constitution. The Chief Justice of Pakistan raised question regarding the constitutionality of Article 239, which was adopted during Zia's rule. The court observed that Parliament lacked unfettered authority regarding constitutional amendment.

The court was expected to accept a particular description of the doctrine so as to invalidate provisions regarding judges' appointment from the 18<sup>th</sup> Amendment through judicial review by applying principle of severability.<sup>564</sup> Even with the acceptance of the notion that judicial autonomy is integral to the basic structure doctrine, judiciary barely provides any standards that what independence specifically entails; it either refers to the appointment process or anything else.<sup>565</sup> Nonetheless, the Supreme Court, after restoration of judiciary, increasingly asserted the inevitability of judicial autonomy as a valid constitutional requirement. The Court, in the PCO

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<sup>562</sup> Osama Siddique, *Across the Border*, 615 Seminar 52, 53 (2010): 54-55, n.13.

<sup>563</sup> Nasir Iqbal, *Parliament Not Under Trail*, Dawn, (July 28, 2010)

<sup>564</sup> Cyril Almeida, *Judicial Appointment Process Under Fire*, Dawn, (September 5, 2010).

<sup>565</sup> Ferejohn, John A., and Larry D. Kramer, "Independent judges, dependent judiciary: Institutionalizing judicial restraint," *NYuL REV.* 77 (2002): 962-63.

judges' case, invalidated the law increasing number of the judges for its inconsistency with judicial autonomy.<sup>566</sup> The Court observed that the President has no discretion to suspend judges. Further, judicial autonomy is an essential constitutional feature, which required security to both office and tenure of the judges.<sup>567</sup>

Similarly, the court declared that withdrawal of criminal cases without judicial consent amounts to transgression of judicial independence. The Court, in the NRO case, observed that delegation of authority to a non-judicial entity for vacating criminal cases, without court's approval, is usurpation and infringement upon judicial autonomy.<sup>568</sup> During the arguments of the 18<sup>th</sup> Amendment case, judges not only passed critical comments about the appointment provisions, but also despised Parliament. Despite the fact that adoption of the Eighteenth Amendment is considered a remarkable achievement in the Constitutional history of Pakistan, the Court criticized and deprecated Parliament for not having debate over the Amendment prior to its incorporation.<sup>569</sup>

The Court also condemned Parliament for not taking confidence of lawyers and Bar Associations who were the petitioners and main stockholders.<sup>570</sup> The Court also criticized Parliament for not recording reasons that led to replacement of the existing process of appointments.<sup>571</sup> The Court even challenged the legitimacy of Parliament in terms of representation of the will of the people and asserted that the amendment is not reflection of public will. Further, the Court challenged configuration of the Committee, which lacked democratic credentials for its members

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<sup>566</sup> Sindh High Court Bar Association v. Federation of Pakistan, PLD 61 (SC 2009): 1111-13, 1142-1144.

<sup>567</sup> Iftikhar Muhammad Chaudhry v. President of Pakistan, PLD 62 (SC 2010): 61, 173.

<sup>568</sup> Mubashir Hussain v. Federation of Pakistan, PLD 62 (SC 2010): 265, 359-71.

<sup>569</sup> Sohail Khan, *Parliament Should Have Debated 18<sup>th</sup> Amendment*: CJ. News International (June 11, 2010).

<sup>570</sup> Sohail Khan, *18<sup>th</sup> Amendment Destroyed CJ's Institution*: Rainday, News International (July 29, 2010).

<sup>571</sup> Ibid.

were not directly elected by people, rather nominated by Parliament.<sup>572</sup> The Court stressed that judicial autonomy is a core value of the Constitution.<sup>573</sup>

In light of the Court's reservations and suggestions, the Amendment was sent back to Parliament for reconsideration.<sup>574</sup> The Court provided two main suggestions to Parliament: firstly, the Court explicitly intimated that Article 175A of the Constitution of Pakistan, 1973 is inconsistent with judicial autonomy and lacked proper judicial representation. The numbers of judges in the Commission should be increased from two to four. Secondly, if the Committee disregarded the Commission's recommendations then the former should refer back the same to the latter for reconsideration coupled with sound reasons for rejection. Where the latter reiterated the same recommendations, the nomination would be considered absolute and binding. The Court ordered implementation of Article 175A with proposed modifications, in order to ensure its consonance with judicial autonomy.<sup>575</sup>

The Court observed that both judiciary and Parliament are indispensable and they are not rivals rather complement to each others, in order to avoid apprehension of institutional clashes, and to ensure a society where people can live with peace and where rule of law prevails. Apparently, the decision embodied restraint, avoided direct determination to the recognition of basic structure doctrine, rather contemplated a Parliamentary discourse.<sup>576</sup> Nevertheless, considering its approach to the doctrine and the Court's consent to hear the petitions barely gave an impression that judiciary will confirm any such restraint. The Court directed Parliament to revise the amendment according to its expectations, and in case of default the former will annul the relevant provisions. Generally speaking, the Court's tendency of treating judicial

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<sup>572</sup> Ibid.

<sup>573</sup> Nadeem Ahmed v. Federation of Pakistan, PLD 62 (SC 2010): 1165, 1180-81.

<sup>574</sup> Ibid. p. 1180, 1183.

<sup>575</sup> Ibid. 1182, 1184-85.

<sup>576</sup> Katzmann, Robert A. *Courts and congress*. Brookings Institution Press, 2010).

autonomy as an abstract but as justifiable judicial guarantee, which augmented concerns regarding recognition of the basic structure doctrine.

Generally speaking, the court and other actors considered independence of judiciary to be a distinguished concept. Judicial autonomy, however, encompasses an evolving equilibrium between independence of judiciary and restraints through a number of relationships and aspects. In the conceptualization of judicial autonomy, the courts adjudicated abstract principles, which remained blurred for its varying nature and case-by-case adjudication of discrete issues. The courts while elucidating independence of judiciary demonstrates complexity. In each case, the court while considering different issues, asserts that the issues are against abstract conception of judicial independence without considering balance of judicial autonomy and its constraints.<sup>577</sup>

Such approach does not necessarily give attention to various dynamics and growing procedures in which overall equilibrium should be examined. These apprehensions are sufficient while considering the constitutionality of laws and administrative actions. Certainly, the stakes are much higher while examining any constitutional amendment: the court's invalidation of an amendment and exclusion of any response from government results in a perpetual modification to the wider institutional balance.<sup>578</sup> On the appointment process, there was a unidirectional discourse between court and Parliament. By adopting the 19<sup>th</sup> Constitutional Amendment, Parliament has partially complied with the court's directions: enhanced the number of judges on the Committee from two to four. Nevertheless, Parliament

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<sup>577</sup> Kalhan, Amil, "Gray Zone' Constitutionalism and the Dilemma of Judicial Independence in Pakistan," (2013): 81.

<sup>578</sup> Maryam Khan, *Towards a New Hegemony*. Friday Times (September 19, 2010).

disregarded the court's directions regarding the Commission's ability of overruling the Committee where it rejects the Commission's nominations.<sup>579</sup>

Afterward, the court on its own ensured the Commission's superiority over the Committee in the appointment matters. In *Munir Hussain Bhatti v. Federation of Pakistan*<sup>580</sup> the Commission's nominations regarding the extension of judges was rejected. The Court overruled decision of the Committee and directed for the judges' extension.<sup>581</sup> The Court while circumscribing the authority of the Committee observed that the latter lacks legal and institutional expertise, in order to challenge the Commission's recommendations concerning nominees' professional caliber and judicial skills.<sup>582</sup>

The Court also observed that the judicial autonomy is a constitutional criterion for upholding judicial primacy over appointments. The outcome of the verdict in two appointment cases was no more than dictation for the application of reconfigured appointment process in a manner not different from that of the pre-Eighteenth Amendment appointment process.<sup>583</sup> The Court aggressively asserted its autonomy despite Parliament's modest constraints, unanimously adopted in the form of Eighteenth Amendment.<sup>584</sup>

### 5.3.3. Judicial Entrenchment and Fragile Parliamentary Sovereignty

After the Eighteenth Amendment case, the judiciary asserted its autonomy both from Military and the civilian government more rigorously than ever before. The court asserted its autonomy more intensely to the parliamentary affairs, which

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<sup>579</sup> Constitution (19<sup>th</sup> Amendment) Act, 2010, No. 1 of 2011.

<sup>580</sup> *Munir Hussain Bhatti v. Federation of Pakistan* PLD 407(SC 2011)

<sup>581</sup> *Ibid.*

<sup>582</sup> *Ibid.* p. 443-445.

<sup>583</sup> Cyril Almeida. *Breathing Room*. Dawn (October 22, 2010).

<sup>584</sup> Kalhan, Anil. "Gray Zone' Constitutionalism and the Dilemma of Judicial Independence in Pakistan." (2013): 82.

adversely affected the civilian government. The following are two worth-mentioning politicized cases: firstly, judicial investigation into the Memogate affairs. The controversy came to fore after the US raid on Osama bin Laden's compound, which was followed by an imminent threat of Military intervention to replace the civilian government. On the President's behalf, Pakistan's ambassador to the United States, *Hussain Haqqani*, sent an unsigned memo to the US military's officials for preventing the imminent coup. The news sparked heated debates across the board regarding the mysterious correspondence and its treasonous nature.

Despite rejection of the allegations, *Haqqani* was not only forced to resign from his office, but also had to face parliamentary committee's inquiry constituted on directions of the Prime Minister. Meanwhile, Military also initiated investigations on its own, spreading rumors regarding the imminent coup. The oppositions including the PML (N) approached the Supreme Court for constitution of a Judicial Commission to investigate the matter. The Court directed *Haqqani* for not leaving Pakistan without considering security to his life. Further, he was not provided due process of law, which is violation of Article 10A of the Constitution. As per directions of the court, Military was filing direct responses in the court without proper consent of the government, which motivated the court to probe the matter. The court, however, has not taken into account the government's investigation.<sup>585</sup>

The court while accepting the petition constituted a judicial commission on the pretext that the matter is associated with fundamental rights, having sufficient public importance.<sup>586</sup> The Court while confirming *Haqqani's* involvement in the memo held that memo's existence and contents has significantly endangered the sovereignty of

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<sup>585</sup> Memogate Case: Kayani, Pasha Relies were Illegal, Implies PM, Express Tribune (January 10, 2012).

<sup>586</sup> Watan party v. Federation of Pakistan, PLD 63 (SC 2011); 997.

the country and implicated with the petitioners' right to life, dignity, and information guaranteed by the Constitution.<sup>587</sup>

Secondly, in the NRO case of December 2009, the Court directed the PPP government to write Swiss authorities to assist in the corruption charges against *Zardari*. The government's reluctance in implementation of the decision led to contempt of court proceedings against the Prime Minister, which was followed by an exceptional order of his disqualification and removal.<sup>588</sup> The government's delay in writing to Swiss authorities was not only meant to safeguard *Zardari* against legal exposure, but to safeguard political fallout of the PPP-led government from prosecution of its incumbent President and party co-chair person.<sup>589</sup> In January 2012, after delay of two years in the implementation of the court's directions, the court articulated six unpleasant options, which included the contempt proceedings against the President and the Prime Minister, or leaving the matter with Parliament or with the people, the commission's constitution for monitoring and application of its verdict.<sup>590</sup>

Finally, the court decided contempt proceedings against the Prime Minister who contended that the President, by virtue of his office, has immunity from criminal prosecution so he is constitutionally not allowed to write to the Swiss authorities against the President. In April 2012, the court while rejecting the arguments convicted him and imposed a symbolic sentence lasting for about half minute.<sup>591</sup> Though it was believed that this sentence was an effort of the court to yield the clash and let the political process to decide *Gillani*'s fate. Nevertheless, opposition challenged the

<sup>587</sup> Ibid. p. 1053, 1068-82.

<sup>588</sup> Azam Khan, 'Gone: The Office of the Prime Minister Stands Vacant', Express Tribune (June 20, 2012).

<sup>589</sup> Cyril Almeida, *The Swiss Conundrum*, Dawn (February 5, 2012).

<sup>590</sup> Adnan Khawaja v. State, Crim. M.A. 486/2010 (January 10, 2010).

<sup>591</sup> Yousaf Raza Gilani, Crim. O.P. 6/2012 (April 26, 2012).

Speaker's ruling against not referring Gilani's disqualification from holding office under Article 63 (1) (g).<sup>592</sup>

In June 2012, the court not only overruled Speaker's decision, but also disqualified the Prime Minister with retrospective effect, the date on which he was convicted by judiciary, April 2012.<sup>593</sup> Like previous stances, the court invoked same abstract of judicial autonomy and held that the Speaker's ruling had disregarded judicial autonomy and thereby ridiculed judiciary.<sup>594</sup> Since restoration of judiciary, the court's assertion to these kinds of autonomy is identical with the reprisal of its typical role to facilitate the subversion of elected governments as evident in Military regimes.

Similarly, the court, in the Memogate case, preferred its own investigation over that of Parliament and fundamental rights over national security. *Asma Jahangir*, Haqqani's legal representative, considered it a conspiracy against the ruling government for regime shifting. Military's unwillingness to oust the PPP government directly, instead utilized judiciary and opposition in order to sabotage the PPP indirectly.<sup>595</sup> Even in default of any possible conspiracy, the whole episode depicts an institutional imbalance that how judiciary benefited Military at the cost of the civilian government. In *Gilani's* case, the court represented and imposed its authority like an arbiter of democratic righteousness, determined honesty of the legislator to hold office, and Parliament's internal affairs. Unlike its recognition in the earlier cases on the constitutional authority of the Speaker and the Election Commission over the issue of questions, this verdict amounted to abolish discretionary authority of the Election Commission as well as the Speaker regarding conviction of a Parliamentarian by a

<sup>592</sup> Article 63(1)(g) of the Constitution of Pakistan, 1973.

<sup>593</sup> Muhammad Azhar Siddique v. Federation of Pakistan, PLD 64 (SC 2012).

<sup>594</sup> Ibid. p. 15, 22-23.

<sup>595</sup> Sidrah Molz Khan, "Darkest Day" for Judiciary: National Security has Trumped Fundamental Rights: *Aena*, Express Tribune (December 30, 2011).

competent court.<sup>596</sup> In the instant case, the court also held that as a result of conviction, disqualification will follow automatically, which is only subject to appellate judicial review.<sup>597</sup> This unprecedented move replicates the President and the military during 1990s. The court provided services as an extra-parliamentary broker, in order to provide short-term benefit to the opposition at the expense of the governing party.

Both cases witnessed that the court intervened Parliament's internal affairs. The court, in Memogate case, refused to suspend its own investigation rather privileged its inquiry against Parliament's investigation. In *Gilani*'s case, the court reviewed and overruled the Speaker's ruling and considered it beyond Parliament's internal proceedings. The court declared that the matter is not precluded from judicial review.<sup>598</sup> The court also declared retrospective effect to *Gilani*'s dismissal and directed the President to take necessary steps to ensure democratic process. The implications of both these cases were paternalistic in nature. Both the President as well as Parliament had not been trusted to carry out their own affairs without court's overseeing authority.<sup>599</sup>

Recently, in *Panama Papers Case*<sup>600</sup>, the court set another precedent. In order to investigate the panama papers controversy, the court constituted the Joint Investigation Team (JIT), where two of the officials were from the Military Intelligence and the Inter-Services Intelligence. The Court disqualified the elected Prime Minister, on the basis of the inquiry report submitted by the JIT. The report declared three of Sharif's children as owner of the offshore companies suspected of

<sup>596</sup> Muhammad Azhar Siddique v. Federation of Pakistan, PLD 64 (SC 2012): 28,48.

<sup>597</sup> Kalhan, Anil. "Gray Zone' Constitutionalism and the Dilemma of Judicial Independence in Pakistan." (2013): 87.

<sup>598</sup> Muhammad Azhar Siddique v. Federation of Pakistan, PLD 64 (SC 2012): 33-55.

<sup>599</sup> Sardood Ijaz, *Don't Pity US, My Lord*. Express Tribune (May 12, 2012).

<sup>600</sup> Imran Khan Niazi v. Mian Muhammad Nawaz Sharif, Petition. No. 29 and 30 of 2016 and 03 of 2017

money laundering. Based on the evidence collected by the JIT, the court directed the NAB to file corruption cases against Sharif and his family. The JIT reported that it has been secured evidence from the UAE, which not only confirmed Sharif's status as Board's Chairman of a Dubai based company, but also draw salary even after taking charge of the Prime Minister's office.<sup>601</sup>

Previously, Sharif has been ousted from holding Prime Minister's office twice: in 1993 through a Presidential Order and in 1999 through Musharraf's coup. In the instance case, turning of inquiry into an investigation about Sharif's moral character depicts the court's intervention in the political matters. Despite the fact that Sharif was not personally implicated in the Panama leaks and there was no evidence on record to justify his misuse of public office for private gain. The Court, nevertheless, disqualified him for hiding assets, not being honest, hence, failed to comply with the requirements of the Article 62 (1) (f)<sup>602</sup> and Section 99 (1) (f) of the Representation of the Public Act (ROPA). As a consequence of the disqualification, Sharif has to step down as Prime Minister as well as party chief. The PML (N) government passed a bill and modified Clause 5(1) of the Political Parties Order (PPO) of 2002, which allowed Sharif to be re-elected as a President of the ruling party.<sup>603</sup> This initiative of government was challenged under Article 184 (3) on the pretext that the matter is of public interest and related with the enforcement of fundamental rights. The petitioners alleged that it is contrary to Articles 62, 63, and 189 of the Constitution.

Most recently, Parliament passed Election Act, 2017, which sparked agitations around the country. The Act raised controversy regarding the nomination form (Form A), which Parliamentarians are required to sign as an affidavit regarding the finality

<sup>601</sup> Aqil Shah. *Pakistan's Court Sets a Dangerous Precedent*. The New York Times ( July 28, 2017).

<sup>602</sup> Article 62 (1) (f) of the Constitution of Pakistan, 1973

<sup>603</sup> Irfan Ghauri. *Way Paved for Sharif to Head PML-N Again*. The Express Tribune (September 22, 2017).

of the Holy Prophet (PBUH). The Act replaced an affidavit with a declaration: the words “*I solemnly swear*” were replaced with “*I believe*” in the absolute and unqualified finality of the Prophet-hood of Muhammad (PBUH) as the last prophet. Further Section 7B and 7C<sup>604</sup>, which is related with the status of *Ahmidis*, had also been omitted from the Act.<sup>605</sup> Senator, *Hafiz Hamdullah*, pointed out the controversial provisions, which the government declared to be a clerical mistake and the senate unanimously passed Election (Amended) Bill, 2017 by restoring the finality of the Prophet (PBUH) to its original form. The Amended Act incorporated Section 48A whereby status of *Ahmidis* etc remained unchanged. A parliamentary committee, headed by *Raja Zafar-ul-Haq*, was constituted to probe into the matter. The committee released a report that has yet to be made public.<sup>606</sup>

Despite the correction, the supporters of certain religious parties, *Tehreek-i-Khatam-i-Nabuwat* (TKN), *Tehreek-e-Labaik Ya Rasool Allah* (TLY), and *Sunni Tehreek* (ST), started agitations considering it to be a deliberate act of conspiracy on the part of the government, which the latter had already deemed a clerical error and had subsequently rectified. A supporter of the TKN also challenged the controversy in the Islamabad High Court and contended the reversal of the controversial provisions in totality, dismissal of the Law Minister, *Zahid Hamid*, and strict actions against the responsible persons. The court directed the protestors, who sit-in at *Faizabad, Rawalpindi* for about twenty-one days, to disband the protest. The court declared the protest unlawful as a ban has already been imposed on the public gathering in the city and there are certain designated places for such gatherings.<sup>607</sup>

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<sup>604</sup> See Section 7B and 7C of the General Election Order, 2002.

<sup>605</sup> Muhammad Imran. Religious Parties Protesting in Islamabad Advised to End Sit-in by Court. Dawn. (November 16, 2017).

<sup>606</sup> Javid Hussain. Raja Zafarul Haq committee report on controversial amendment comes to light

<sup>607</sup> Fawad Hassan. *Faizabad Sit-in: the Trial of 21 Days*. The Express Tribune. (November 27, 2017).

As a last resort, the Court directed the district administration to evict the protesters and in case of default, the Interior Minister was warned of contempt of court for not complying with the court's orders. The court also observed that the protest's leaders had committed an act of terror by continuing their protest despite the court's order. Eventually, with the consistent failure of the dialogues with the protesters, the government launched operation to disperse the protesters. The government also required army for assistance under Article 245 to act in aid of civil power.<sup>608</sup> Unprecedentedly, army refused to comply with the government's directions on the pretext that it cannot use force against its own civilians.<sup>609</sup> Consequently, the government turned towards negotiations with the protesters and had to bow and accept a number of their demands: resignation of the law minister, probing of the controversy and prosecution of the responsible persons under relevant laws, release of the religious workers arrested since November 6, 2017 and dismissal of cases against them, and the government shall pay compensation to the people for any lost sustained during the protest.<sup>610</sup>

In this whole episode, army became a mediator and facilitated the agreement between the government and the protesters. The court severely criticized Military for brokering the agreement with the protesters and accused Army's Officials of an alarming reach into politics. The court showed high concerns regarding Army's role as a mediator and declared it alarming because a senior Army Official, *Major General Faiz Hameed*, had signed the agreement with the protesters, and role of the army's team in the pact.<sup>611</sup> Despite judicial criticism, Army had taken all the credit, public

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<sup>608</sup> Article 245 of the Constitution of Pakistan, 1973.

<sup>609</sup> Text of agreement signed with protesters. The News (November 27, 2017).

<sup>610</sup> Ibid.

<sup>611</sup> Nadir Guramani. *What forced Government to Sign Agreement with Faizabad Protesters, asks Rabbani*. Dawn (November 27, 2017).

confidence, and declared to be the real winner of the game because it has reinforced the image of the armed forces at the cost of embarrassing the fragile civilian rule.<sup>612</sup>

These recent developments are self-evident that how weak Pakistan's institutional structure is. In the recent controversial Election Act of 2017, which has already been rectified by the government and restored the provisions regarding finality of the Prophethood to its previous form in totality, both the Court and Military left no stone unturned to further undermine the civilian government. The court unnecessarily pressurized the government and issued contempt notice against the Interior Minister for eviction of the protestors.<sup>613</sup> The Court's optional remarks regarding government's strategy for dispersing the agitators could not be justified by any means. The Court further politicized the government by passing adverse remarks that the government had made one person a scapegoat, in order to protect another person. Similarly, the Military also disregarded its constitutional role to act in aid of the civilian government, which is beyond its constitutional mandate. Despite complying with the government's directions to disband the protestors, Military facilitated accord between civilian government and agitators, whose activities were already been declared by the Court as an act of terrorism. Like previous practices, military earned itself a good title and entrenched its authority at the expense of civilian government.

In the recent years, the Superior Courts have increasingly asserted its autonomy. Nonetheless, it has poor track-record of upholding democracy against extraconstitutional and extra-democratic regimes; the court has validated coups of 1958, 1977, and 1999 on the pretext of state necessity. After 2009, the court,

<sup>612</sup> Parveen Constable. *Pakistan Caves to Protest Demands by Forcing our Law Minister after Days of Unrest*. Asia & Pacific. The Washington Post (November 27, 2017).

<sup>613</sup> Haseeb Bhatti & Muhammad Imran. *Contempt of Court Notice Issued to Ihsan Iqbal for Inaction over Faizabad Sit-in*. Dawn (November 24, 2017).

motivated by a populist approach, asserted its autonomy more aggressively not only against Military, but also against representative governments. The Court also received criticism for deposing Sharif without providing due process or fair trial<sup>614</sup> to prove his innocence. Interestingly, the previous government was interested to remove Article 62 and 63 from the Constitution during the drafting of the Eighteenth Amendment. Nonetheless, the PML (N) government opposed that and Sharif became the first ever Prime Minister to have been disqualified under this law.

In the instant case, the Court observed that as required under Section 12 (2) (f) of the Representation of People Act (ROPA) of 1976, Sharif had been dishonest for concealing his receivable salary, which he was required to furnish in the nomination papers of 2013 elections. Further, the Court directed the Election Commission to issue his disqualification notification with immediate effect and directed the President to take all essential constitutional steps to ensure maintenance of the democratic process. The Court also nominated a judge to supervise and monitor implementation of this decision and to oversee the proceedings conducted by the NAB and the Accountability Court.<sup>615</sup>

As evident from the analysis of aforementioned cases, the Supreme Court of Pakistan is increasingly asserting its autonomy. Simultaneously, the functional space for the representative institutions has been reducing, which creates prospects of institutional confrontation. The Court seems to have been exercising jurisdiction beyond its constitutional mandate. Technically speaking, the court's jurisdiction is neither inquisitorial nor it is expected to supervise and monitor an investigation. The court while applying its self-conception of judicial autonomy kept on challenging the

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<sup>614</sup> Article 10A of the Constitution of Pakistan, 1973 guarantees fundamental right of fair trial and process of law.

<sup>615</sup> Imran Khan Niazi v. Mian Muhammad Nawaz Sharif, Petition, No. 29 and 30 of 2016 and 03 of 2017

constitutional amendments and thereby compelled Parliament to amend the constitutional provisions in the light of its recommendations. The Court also entrenched its authority in the core Parliamentary affairs and deposed an elected Prime Ministers on the contempt of court, one for not writing the Swiss authorities against the incumbent President and the other one for not disclosing certain facts regarding his assets in the nomination papers of 2013 elections. Such type of judicial activism adversely effects consolidation of democracy, constitutionalism, and further undermines fragile democratic transition.

However, the proponents of judicial activism appreciates the Court's interference in Parliamentary affairs, in order to maintain a reasonable control on the latter and keep it on the right track so as to avoid misuse of the legislative authority for personal whirrs at the expense of other state organs including judiciary. The elected representatives are not only answerable to people, but also to courts and can be prosecuted for their wrongs. Judicial autonomy and its surveillance to the other state organs makes the democratic transition progressive and helps realize the governmental branches to demarcate their jurisdictional spheres. Keeping in view the two extremes of the judicial activism, the opponents and proponents, need of the hour is how judiciary would strike a fair balance between its own autonomy and its constraints.

#### **5.3.4. Judiciary's Representation of Public Will and its Accountability**

##### **Mechanism: a Self-Conception**

Unlike the US, where researchers have significantly examined relationship between judicial decisions and public opinion, the recent political and constitutional

developments in Pakistan offer an interesting perspective to study that relationship.<sup>616</sup> In Pakistan, the Superior Judiciary has rapidly realized that the people of Pakistan have directly defined and legitimated their professional identities and role. This self-conception can be linked with the expansion of the *sue motu* actions and public interest litigations, which took its roots even before restoration of judiciary.<sup>617</sup> This self-conception was further entrenched with lawyers' movement backed by public mobilization for restoration of judiciary and democracy.

Due to public mobilization against Military regime and favour of judiciary, the latter came to realize itself as legitimated by and accountable to public who rallied and demonstrated their support.<sup>618</sup> With the restoration of judiciary in March 2009, this conception has significantly increased in the court's opinions.<sup>619</sup> For instance, Justice *Asif Saeed Khan Khosa*, in *Gilani*'s contempt case draw a line from the will of the people to his contempt and conviction, without considering his status as parliamentarian and the Prime Minister of the state. He opined that people who have adopted this Constitution, not only have final ownership of the Constitution, but also its institutions. Primarily, people have the authority to punish an individual for contempt of court, created by people for adjudication. Likewise, anyone who disregards the court's decision actually challenge public will and any sanction in response of such contempt is in fact awarded by people and not by the courts.<sup>620</sup>

<sup>616</sup> Friedman, Barry. *The will of the people: How public opinion has influenced the Supreme Court and shaped the meaning of the constitution*. Farrar, Straus and Giroux, 2009; Epstein, Lee, and Andrew D. Martin. "Does Public Opinion Influence the Supreme Court-Possibly Yes (But We're Not Sure Why)." *U. Pa. J. Const. L.* 13 (2010): 263.

<sup>617</sup> Tasneem Kausar, *Judicialization of Politics and Governance in Pakistan: Constitutional and Political Challenges and the Role of the Chaudhry Court in Pakistan's Stability Paradox* (Ashutosh Misra & Michael E. Clarke eds., 2011); Kennedy, Charles H. "8 The judicialization of politics in Pakistan." *The Judicialization of Politics in Asia* 12 (2012).

<sup>618</sup> Declan Walsh. *Pakistan Court Widens Role, Stirring Fears*. New York Times (January 23, 2012).

<sup>619</sup> Raza Rumi. *The Task Ahead*. News International (April 11, 2010); Faisal Siddiqi. *Legal Empire*. Dawn (January 13, 2012).

<sup>620</sup> Kalhan, Anil. "'Gray Zone' Constitutionalism and the Dilemma of Judicial Independence in Pakistan." (2013): 89.

While disqualifying *Gilani* from the office justice *Khawaja* claimed that judiciary has coequal status with Parliament, both institutions reflects the will of the people.<sup>621</sup> While contesting the idea that only Parliament represents the populous will, Justice *Khawaja* asserted that the Court while in exercise of contempt power disqualified *Gilani*. He observed that the Court had only performed its function to ensure parliamentarian's compliance with public will, envisaged in the Constitution.<sup>622</sup> This self-conception of judiciary can be comprehended with popular sovereignty, which is based on rationalization of constitutionalism, where judicial functioning is validated and restrained by a constitution reflecting the will of the people.<sup>623</sup> Simultaneously, the Court has challenged public representatives on the pretext of judicial autonomy and its authority on the same grounds extended to Military and its associated interests.<sup>624</sup>

In order to design a theoretical framework for judiciary to reinforce democratic consolidation, judiciary is required to overcome at least two ironies which have been increasingly observed in the Superior Judiciary and characterized as self-conception of judicial sovereignty:<sup>625</sup> firstly, disconnection between the Superior Judiciary's priorities and other public needs in transition of its reforms. Logically speaking, a court animated by direct public legitimacy and accountability prioritize its work differently. To conclude differently, the court's excessive involvement, both in terms of time and resources, in dealing with high profiled political cases, which the court is undertaking on the pretext of public will, may tantamount to neglect an uplift of an eroded judicial system on which the Superior Judiciary has ultimate supervisory

<sup>621</sup> *Siddique v. Federation of Pakistan*, PLD 106 (SC 2012).

<sup>622</sup> *Ibid.* p. 2, 1.

<sup>623</sup> Ackerman, Bruce. "Constitutional politics/constitutional law." *The Yale Law Journal* 99, no. 3 (1989): 453, 464-65; Law, David S. "A theory of judicial power and judicial review." (2008).

<sup>624</sup> Kalhan, Anil. "'Gray Zone' Constitutionalism and the Dilemma of Judicial Independence in Pakistan." (2013): 90.

<sup>625</sup> Faisal Siddiqi. *Judicial Sovereignty*. Dawn (June 26, 2012).

responsibility.<sup>626</sup> Unlike the superficial tendency towards *suo motu* actions and upholding of welfare projects other than the administration of justice such as construction of dam, the majority of public preferred and associated with the lower judiciary, which has been facing so many challenges: enormous cases backlog, corruption at root level, and other associated problems creating hindrances to expeditious justice. Similarly, within the superior judicial fabric, the excessive focus exclusively on political issues inversely affects the other cases and essentially means that ordinary public cases barely appear on the Cause List.<sup>627</sup>

Secondly, the nature of the courts' legitimacy and its accountability mechanism is deeply concerned with the consolidation of democracy. Despite the fact that judiciary increasingly considers itself as representative of people, there are so many justifications for negating the notion of judiciary's self-conception of public legitimacy and accountability discourse: people share no direct role in judges' appointment and removal. Considering the evolution of judges' appointment and removal mechanism, people even lack indirect role through their representatives. Further, public opinion cannot directly update or influence adjudication by any means. To counter this argument, judiciary might anticipate its inferring the populous will from independent media. Nevertheless, the excessive media coverage and its vulnerability towards Military and its affiliates used the former as an imperfect proxy tool for utilization of popular will.<sup>628</sup> On this pretext, the popular will also gives license to media to register judicial criticism. In fact, judiciary sought to diminish the

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<sup>626</sup> Osama Siddique, *Wasteland of Discourse*, Friday Times (September 19, 2010).

<sup>627</sup> Rues Aama, *Judiciary Always Supports Army Rule*, Express Tribune (January 12, 2012); Shyema Sajjad Justice, *Samosas and the Ostrich*, Dawn (July 27, 2012).

<sup>628</sup> Waseem, Mohammad, "Clash of Institutions in Pakistan," *Economic and Political Weekly* (2012): 17.

minimum standards of judicial accountability by challenging and restricting its criticism in media.<sup>629</sup>

In the given context, judiciary showed concern in stronger representative institution and their accountability. Judiciary is more inclined how to implement mechanism of judicial accountability, which could better legitimate the Supreme Court's role. Despite the fact, Parliament has never been subjected judiciary to any external constraints to ensure that the latter has been acting lawfully within its constitutional mandate. On the other hand, judiciary remained vulnerable to Military and its affiliates, which projects one of the institutional weaknesses. Up till now, Parliament has neither been successful in restraining judiciary nor made any such serious efforts. Unlike the Chief Justice's claims that negate supremacy of Parliament, no one in Parliament stood up against the Chief Justice.<sup>630</sup>

In order to safeguard the Prime Minister's office from the assertions of the court's authority, the government has adopted the Contempt of Court Act, which circumscribes court's contempt authority. Nevertheless, the court invalidated the Act and declared it unconstitutional. Further, the court considered its constitutional authority to penalize and use contempt of court as an effective and unconditional tool to uphold its sovereignty. The court concluded that the Constitution neither permits nor confers any right on Parliament to limit court's contempt power and any such constraint amounts to violation of its dignity and sovereignty.<sup>631</sup> Without striking any balance or a rational compromise between judicial autonomy and its constraints, the Court's continuous assertion of authority could be a potential threat to the trichotomy of powers, which is the very foundation of the constitutionalism.

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<sup>629</sup> Kalhan, Anil. "Gray Zone' Constitutionalism and the Dilemma of Judicial Independence in Pakistan." (2013): 92-93.

<sup>630</sup> Cyril Almeida. Judging the Court. Dawn (July 15, 2012).

<sup>631</sup> Baz Muhammad Kakar v. Federation of Pakistan, Constitutional Petition No. 77/2012 & CMA No. 3057/2012, 14 (August 3, 2012).

#### **5.4. CRITIQUE**

To conclude with, the current shift towards the civilian government has entailed significant institutional developments, which are unprecedented in its nature. Difference apart, the prevailing transition could be genuinely rationalized with a potential for enduring foundation for democracy and constitutionalism. To a great extent, the ultimate outcome of this transition is contingent upon a continued and effective challenge to military control, which is backed by a number of state actors including political oppositions. In order to keep this democratic transition on a positive track of development, rationalization of the judiciary's role is inevitable. The institutional identity of judiciary that travels beyond the notion of judicial independence and assumes the maximum autonomy is considered preferable in the given context.

Nevertheless, the normative discourse of this judicial role revolves around two basic conceptions: firstly, excessive judicial intrusion into the democratic governance could be a potential threat. Secondly, judicial autonomy is providing a basis for hope. In this context, judiciary with maximal autonomy can help ensure institutional compliance to constitutional mandate. Nevertheless, the philosophy of optimism and over-ambitituousness are barely succeeded. Keeping in view Pakistan's historical experience, assertion of maximum judicial autonomy with a hope to uphold democracy, can turn opposite to this perception. Judicial autonomy can be manipulated against a fragile democratic process, which ultimately strengthens the well-entrenched status quo interests.

For long term democratic consolidation, Pakistan inevitably needs representative institutions backed by judiciary and strong governance capabilities to

reign in the entrenched military and its associated interests.<sup>632</sup> Keeping in view the weaknesses of fragile representative institutions, persistent vulnerability to military and its affiliates, and its anti-democratic legalizing discourse, a fully independent judiciary without an adequate balance between its sovereignty and constraints can potentially create threats for democratic transition. Both the state organs, instead of confrontation with each other, should strengthen each others to diminish the entrenched military and its preservation in civilian governments. At the same time, state organs are expected to demarcate a circle of their jurisdictional domain and extent to keep check on other state organs, in order to keep democratic transition on the right track. Pakistan's experience of this constitutional regime-change with all its associated risks and institutional relation can help other countries understand how to search for a more comprehensive shift to democracy and constitutionalism.

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<sup>632</sup> Raza Rumi. *The Flawed Boycott Mantra?* News International (February 21, 2008).

## **CONCLUSION**

To conclude extensive research on "*Constitutionalism and the Dilemma of Judicial Autonomy in Pakistan: a Critical Analysis*" it can be recapitulated that the democratic system in Pakistan has been experiencing an alternate regime-shift between military and civilian governments. During the oscillation of these regimes, judiciary has been forced and motivated by various factors to validate extraconstitutional actions and to justify military coups. Military, during its direct rule, deep rooted its authority and successfully transformed its authority even in civilian governments. This hegemony of authoritative preservation is a challenge to Parliamentary autonomy and can be diminished with the consolidation of democratic system by empowering institutional architecture and a real independent judiciary, making equilibrium between judicial autonomy and its constraints.

Constitutionalism identifies the sources wherfrom the government derived authority and demarcates the bounds within which that authority is to be exercised. The concept of constitutionalism is not only confined to the forms and procedure of governance, but also focuses on the limitations and distribution of state authority. This concept is very meaningful for the establishment of a democratic government, where every state organ recognizes the existence of other state organs, their separate identity, and motivated with a sense of mutual cooperation by subjecting itself to a reasonable control from the other state organs to avoid misuse of their powers. In western democracies, these functions have been marked by an enduring evolutionary process. While in the newly emerging democracies like Pakistan, these institutional functions are indistinct and will take a reasonable time to identify their jurisdictional circles.

The state organs emanate their authority from the constitution, which represents the popular will. The idea of constitutionalism can be rightly linked with the political theories of John Locke and the founders of the American republic who had not only believed in restrictions on the governmental power, but also advocates compliance to those limits in its functioning. Constitutionalism also elucidates that a government must have taken its authority from a set of written rules, which is contrary to the concept of totalitarian states, where powers are concentrated in a single authority and is more susceptible to misuse. The idea of constitutionalism, which is well established and flourished in the western democratic world, got appreciation and motivation in the third world countries, consenting the conferment of powers to the state organs from a supreme document, which represents the will of the people.

The document representing popular will entails entrenched constitutional norms, including establishment of the state organs, their functioning, and mutual controlling mechanism. In doing so, judiciary was conferred with the power of review if any state's organ exceeds its authority and to ensure their functioning within the bounds provided by that very document. Like other emerging democracies, Pakistan has been passing through a democratic transition, where military and its affiliated interests have directly ruled this country for more than thirty-five years. In this whole democratic transition, judiciary played a very critical role: it has justified all military interventions, legalized their extraconstitutional actions on the pretext of state necessity not only at the cost of civilian government, but also compromised its own integrity and autonomy.

With the regime shift in Pakistan, the Superior Courts have frequently changed its jurisprudential viewpoint, which created a dilemma of judicial autonomy: upheld military rule at the expense of fragile democratic system and stood behind the

democracy when it comes to the civilian governments. With the restoration of judiciary and democratic rule, after post-Musharraf's regime, both institutions were committed to preserve and uphold their institutional sovereignty. In these coequal efforts, both institutions proactively responded, which created the dilemma of institutional confrontation: on one hand, judiciary not only invalidated extraconstitutional actions, but also challenged the government on self-conception of its autonomy and went further by declaring itself the arbiter to settle core political issues. On the other hand, the government, through constitutional reforms, prohibited military interventions, discouraged judiciary from validation of extraconstitutional actions, and brought about institutional reforms for imposing modest constraints on judiciary, which was immediately counteracted by judiciary. These institutional conflicts can help the military reinforce its authority.

The concept of limited, restricted, and controlled government can be associated with the normative logic of actions: some of the constitutionalists believe in the bivalent actions: proper or improper use of authority and expecting the governmental authorities to perform proper actions. In the perspective of constitutionalism, actions are trivalent: permitted, prohibited, and required. Logically speaking, the constitution has to ensure that a state does what is required to be done and restrained from doing what is prohibited. Immature democracies which are passing through a transitional phase of development, experience variations in terms of compliance to the constitutional rules, leaving effects on the institutionalization of the democratic system: the more political actors adhere to these constitutional rules the more institutionalized democratic system will be achieved.

Constitutionalism broadly defines these rules and norms, which are generally recognized as prerequisites for the consolidation of democracy. Despite the fact,

constitutionalism is a fundamental criterion in the process of democratization; it has hardly received any attention. On contrast, socioeconomic and cultural factors have significantly contributed to the incline or decline of the institutionalization of democracy. However, modern research associated democratization with constitutionalism as compare to the socioeconomic and cultural developments. The constitutionalism ensures the rule of law. A country is said to have been characterized by constitutionalism and democratic institutionalization where the constitution equally distributes the state's powers, ensuring smooth functioning of the democratic process. Constitutionalism must also satisfy the following tests: protections to the institutions, making the government responsive and predictable, and ensuring peaceful resolution of the conflicts. The debate of constitutionalism also necessitates the conceptualization of sovereignty. Unlike John Locke who believes in limited sovereignty, Thomas Hobbes and Austin advocate the idea of unlimited sovereignty, which may be referred to the British Parliament having unlimited legislative authority. The democracies with limited sovereignty such as the USA, India, and Pakistan, the government's powers are restricted by their respective constitution. Another important aspect of sovereignty is the identification of the sovereign body and how that sovereign authority is being exercised. Precisely, there are various concepts regarding sovereignty.

The concept of judicial activism in Pakistan can be traced back to the Government of India Act, 1935<sup>633</sup>, which was incorporated in Article 170 and 22 of the 1956 Constitution, Article 98 of the 1962 Constitution, and Article 199 and 184 (3) of the 1973 Constitution. The concept of judicial activism emerged with the Islamization of laws by Zia-ul-Haq in the 1980s, which were categorized in the form

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<sup>633</sup> Section 223, 223-A, and 204 of the Indian Act, 1935.

of structural, procedural, and criminal law reforms. The Appellate Shariat Bench of the Supreme Court was delegated with limited *suo motu* jurisdiction, in order to check consistency of laws with the Islamic injunctions. Nonetheless, the Superior Courts expanded this power and replaced codified laws with un-codified Shariah principles. Prior to the incorporation of Article 2A, the court consented that the executive has exclusive authority in the Islamization of laws. In 1985, by virtue of Article 2A, Objectives Resolution was made a substantive part of the Constitution, which made the Shariah superior over the statutory system and authorized the court to apply it directly.

In 1980, Federal Shariat Court was established and Shariat Benches of the High Courts were disbanded. However, with Zia's death the Islamization of laws was interrupted, which was resumed by Nawaz Sharif who remained the Prime Minister of Pakistan for three times without completing any of his tenure. The concept of judicial activism has been significantly associating with the *suo motu* jurisdiction of the Superior Courts. It is worth-mentioning that there is no such concept in the USA. The courts can only adjudicate upon the legal dispute brought about by the adverse parties. The Supreme Court of Pakistan by virtue of Article 184 (3) exercises *suo motu* jurisdiction and takes cognizance where the matter in dispute is of public importance and associated with the protection or enforcement of fundamental rights. After the restoration of the judiciary in March 2009, the superior judiciary significantly acquired its autonomy not only from Military and its associates, but from Parliament and consequently narrowed down functional space for the executive. The civil government also expanded its authority for its supremacy creating the dilemma of institutional conflicts, which ultimately helps reinforce military and its affiliated interests.

After military invention of 1999, *Iftikhar Chaudhry* validated *Musharraf's* every extraconstitutional action, until the former assumed the charge of the Chief Justice in June 2000. The regime's expectations turned around when the court challenged the regime's authority. The privatization and economic liberalization policies created room for public interest litigations. The court strategically challenged the regime – started from implication of provincial officers in the CDA and the LDA cases, implicated the Federal Ministers in the oil and sugar prices cases, implicated the Prime Minister in the privatization of the PSO, the PTCL, and the PSM cases, implicated Army and agencies in the missing persons cases, and finally implicated *Musharraf* to contest presidential election while serving in the Army. As a consequence, *Chaudhry* remained suspended for four months until October 2007. The Court withheld the results of presidential elections, in order to review *Musharraf's* eligibility for the presidential elections. However, *Musharraf* proclaimed emergency before the Court's decision. There were so many contributing factors that involved in the Court's transformation from pro-regime to anti-regime: *Iftikhar Muhammad Chaudhry's* strategic leadership, regional jurisprudential advancement, the role of media and civil society, policies of economic liberalization, and regime's adherence to the court's directions without realization of its repercussions.

For a successful democratic system, the US envisaged the idea of separation of powers among the legislature, the executive, and the judiciary. In order to avoid misuse of these organs' authorities, the US also introduced the concept of checks and balances, which was considered to be the first fundamental principle of the US Constitution. However, in developing democracies like Pakistan, institutional norms are not well-established and state organs are not certain about their jurisdictional

ambits, which lead to institutional conflicts. These conflicts advance and give room to military and its associated interests.

Judiciary was influenced by the military and was forced to validate the despotic regimes, which adversely affected the representative institutions. As a result, Pakistan remained under direct Military rule for more than three decades.<sup>634</sup> During its direct rule, Military entrenched, preserved, and transformed its authority to the civilian governments and even after the regime-shift the former successfully established its authority in the latter. However, this institutional disequilibrium never remained unchallenged. Pakistan's recent developments towards upholding democracy offer potential for enduring democratic system and constitutionalism. Since 1947, the transition of alternative governance between the civilian governments and Military not only created institutional disparity, but also strengthen Military at the cost of the civilian rule.

Since the very beginning, Pakistan's democracy has been oscillated between two ideals: colonial form of government, which focuses on concentration of powers and supports presidential government. Another one is Parliamentary form of government, which emphasizes on federalism and the supremacy of Parliament. Despite the fact that military lacks coercive capacity to regulate state affairs, military has seized power and predominated over political actors. Military received generous support from the bureaucrats, political opposition of the government, and judges for validation of extraconstitutional actions. These facilities and assistance enabled Military to extend its authority even in civilian government. Consequently, the military extended its influence from defense and foreign policy to socioeconomic and political construction of the government, which further entrenched its authority.

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<sup>634</sup> Ayub Khan from 1958 to 1969, General Yahya Khan from 1969 to 1971, General Zia-ul-Haq from 1977 to 1988, and General Pervez Musharraf from 1999 to 2008.

Military justifies its antidemocratic discourse by two means: security and competent institution. Military represents itself as a symbol of stat security and its existence. This projection of itself as a guardian of the state and the state of insecurity motivated it to come forward. This self-conception of professionalism projects Military as the most competent institution whereas the politicians were projected as incompetent, corrupt, and dishonest, resulting two pronged impacts: reinforced Military as an institution and undermined the representative institution. In this process, judiciary played a contrary role to its legitimate expectations, validated despotic regime and viceregal form of government in two ways: legal shield to the extraconstitutional actions of the regime on the pretext of state necessity and supported that extraconstitutional discourse even in the civilian government.

Military gradually transformed Pakistan's constitutional order and reinforced viceregal form of government, in order to extend its authority to the civilian government. For example, with Zia's introduction of 8<sup>th</sup> Amendment, the executive authority was shifted to the President at the cost of the Prime Minister and Parliament. Further, the amendment incorporated Article 58 (b) (b), which conferred discretion in the President to dissolve the assembly as evident between 1988 and 1996, where four civilian governments were dismissed. This transformative preservation has left adverse impacts on judiciary's institutional identity, functioning, and impartiality, which resulted imbalance among the state organs. Ultimately, judiciary lacked autonomy both in terms of its integrity and sovereignty. The independence of the judiciary is not an absolute concept in itself rather it is the result of its relationship and tendencies towards other state organs, and is meant to protect other objectives such as supremacy of law, democracy, and constitutionalism.

The attributes associated with the judicial autonomy change with various contexts. In Pakistan's context, a strong civilian government with effective judicial accountability apparatus is better than the isolated judicial autonomy, which ensures a balance between judicial constraint and its autonomy. Nevertheless, this balanced concept of judicial autonomy can be influenced by different means such as judicial administration, its composition, appointment and removal, code of conduct, and response to the court's decisions. Owing to the military's disaggregated concept of transformative preservation, it is very challenging to determine overall equilibrium between judicial independence and its restraints. All these conceptions created an image of disequilibrium between military, Parliament, and judiciary.

Throughout the constitutional history of Pakistan, judiciary remained influenced by Military and its affiliates. Even after the restoration of civilian rule, judiciary remained vulnerable to military's influence. Judiciary sought its autonomy from military either at the end of the regime or when it has appeared to be ousted. However, military was sufficiently able to impose constraints on judiciary through extraconstitutional actions as witnessed in *Zia* and *Musharraf's* regimes. On contrast, judiciary sought autonomy more rigorously from the representative government in both Military and civilian rule. Despite the fact that judiciary invested good faith and confidence in military for durable and capable governing authority, in each regime the court diminished military's circle of authority, which was overlooked by military. Consequently, with the recent regime shift, judiciary successfully secured its autonomy from military and its affiliated interests.

While using its transformative authority, the military established its own judicial mechanism, which is now extended to the civilian trial and thereby further entrenched its authority in the civilian government. The establishment of military

courts through 21<sup>st</sup> Constitutional Amendment was not a new concept, the government established military courts in 1977 and 1998, which were struck down by the Court. The Court directed that the terrorism related matters be referred to the Anti Terrorism Courts, which were already part of the civilian judiciary. These courts are significantly impacting the dispensation of justice. Both individuals and judiciary as an institution are adversely effecting with military courts: the former's right to fair trial and due process of law, guaranteed under Article 10A of the Constitution, is hardly considered in military's courts during the civilian trial. The latter's integrity and identity as an institution has been compromised to a great extent. Contrary to the general principles of law, the Protection of Pakistan Act, 2014 allows Military to detain an accused for ninety days. While competing general principles where an accused is considered innocent until proven guilty and where prosecution is liable to establish its cause beyond reasonable doubts, this Act considered an accused guilty unless prove himself innocent.

In the constitutional and democratic transition, judiciary plays a very critical role. The legal scholarship in Pakistan has been convinced that the superior courts' jurisprudence has two-pronged outcomes: firstly, the courts have not only validated extraconstitutional actions and military takeovers, but also supported the regime's transformative preservation in the civilian rule at the expense of the democratic governments and compromised its own integrity as well as autonomy. Secondly, judiciary reinforced the democratic process, invalidated extra-legal actions, upheld rule of law, and ensured its autonomy and institutional integrity. Judiciary while seeking autonomy from the regime's influence also sought independence from the civilian government even more meticulously. Despite the fact that judiciary played a significant role in shaping and advancing the democratic process, there are number of

precedents where the judiciary had not been able to direct the state for upholding rule of law and democratic norms. This anti-democratic approach had been motivated by various factors: fragile approach towards constitutionalism, the courts' dependence on other branches of the government for capacity building, institutional development, and enforcement of its judgments, and lack of autonomy from the other institutions.

There are precedents where judiciary justified extraconstitutional actions and military interventions on the pretext of state necessity, a doctrine that justifies extralegal actions for introducing a successful revolution. On the other hand, there are cases<sup>635</sup> where the judiciary supported the democratic institutions and disregarded the necessity doctrine. However, in this whole democratic transition, judiciary has systematically and gradually imposed constraints on the regime's unbridled extraconstitutional discourse.

With judicial activism, the Court extended its authority to the branches of the government, which got impetus after post-Musharraf's regime and restoration of the *de jure* judiciary. Activism's opponents criticize judiciary for intruding into the executive and consequently undermining the democratic process. The expansion of *suo motu* actions on the ground of public importance, which itself is a general term and lacked specific definition, created a competing discourse in legal community; the opponents believed that its maximized use creates impediments on executive branch's functioning. The proponents argue that judiciary performs executive functioning when the latter fails to discharge its constitutional duties either because of its insufficiency or bad governance.

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<sup>635</sup> *Miss Asma Jilani v. The Government of the Punjab and another*, PLD 139 (SC 1972); *Federation of Pakistan v. Muhammad Saifullah Khan*, PLD 166 (SC 1989); *Muhammad Nawaz Sharif v. the President of Pakistan*, PLD 43 (SC 1993); *Sindh High Court Bar Association v. Federation of Pakistan*, PLD 879 (SC 2009).

Within two years of its restoration, the proponents also felt alienated of judicial activism on various grounds: the court's overseeing authority in the appointment, promotion, and transfer of the bureaucrats and the judges. The constitutionality of certain laws also created concerns regarding judicial activism. Keeping in view the vulnerability of the representative institutions to despotic regimes, which were justified by the courts, the prevalent interbranch controversies between judiciary and civilian institutions emerged as a real challenge to the democratic transition. Nevertheless, these conflicts also create prospects for identification of institutional bounds and may ultimately develop a consensus regarding their autonomy and the extent to which one branch can keep surveillance over the other branches of the government.

After 2009, the Supreme Court exceptionally expanded the scope of Article 184 (3) and took cognizance of the matters ranging from the highest to the pettiest nature of cases, which helped it earn the title of '*people's judiciary*'. The Court invalidated the NRO and directed corruption cases against President *Asif Ali Zardari*. The Court dismissed an elected Prime Minister for not writing to the Swiss authorities on the basis of contempt of Court. The Court while claiming its moral uprightness cultivated the judiciary's image as a guardian of the exploited people's interest. Consequently, the frustrated society, which remained vulnerable to discrimination, injustice, and political exploitation, appreciated and earned a good name for the judiciary, and the same turned out as a legal tool for judiciary's populist stance.

Following *Musharraf's* regime, Parliament brought about constitutional amendment for upholding its supremacy and imposing modest constraints on judiciary, in order to prevent it from validating extraconstitutional actions. On self-conception of autonomy, the judiciary reversed most of these efforts. The other

dilemma in this democratic transition is the personification of institutions, which lacks democratic values and individuals are getting stronger at the expense of their institutions. The court not only asserted autonomy from the government, but also affirmed its role as an arbiter for deciding core political issues.

The government unanimously adopted 18<sup>th</sup> Constitutional Amendment for ensuring the supremacy of Parliament. This Amendment had three main objectives: rolling back extraconstitutional actions and precautions against potential intervention, modest judicial constraints for maintaining a rational compromise between judicial autonomy and its constraints, and safeguards against the judiciary for not validating extraconstitutional actions. Parliament initiated a novel method for judges' appointment whereby the individual capacity of the Chief Justice and the President was substituted with the Judicial Commission and the Parliamentary Committee respectively, which the Court declared an attack on its autonomy. The institutionalization of judges' appointment was meant to keep a modest constitutional constraint on the judiciary. The court challenged this process and referred back the amendment for reconsideration in the light of its recommendations. While complying with the court's directions, Parliament adopted the 19<sup>th</sup> Constitutional Amendment. So, the Court reversed back judiciary to the pre-18<sup>th</sup> Constitutional Amendment phase.

Public mobilization against *Musharraf's* regime helped realized judiciary that its professional identity and role is legitimated by people and is held accountable to people who demonstrated their support. In order to draw a theoretical framework for judiciary to reinforce consolidation of democracy, it must overcome two challenges: firstly, the judiciary needs to reconsider its priorities of public legitimacy and accountability. The Courts involvement in public interest litigations and high profiled

political cases, undertaken in the name of popular will, necessarily amounts to ignore strengthening an eroded judicial system. The majority of people are concerned with the domestic Courts, which are facing so many challenges: overly occupied with cases backlog, security threats to the judges and their families, corruption and influence to manipulate impartial adjudication. In the Superior Courts, maximum focus on the public interest litigation and taking cognizance of cases purely political in nature adversely affects the regular cases and integrity of the courts. Secondly, the Courts legitimacy and accountability is linked with the consolidation of democracy not with the individuals. There are various grounds for opposing the judiciary's self-conception of public accountability and legitimacy: public have no direct role in the judges' appointment and removal. Moreover, public opinion cannot influence adjudication. If judiciary anticipates inferring popular will from the independent media. The excessive media courage and its inclination towards Military can use it as a proxy tool for manipulation of public will.

*Post-Musharraf's* democratic shift entails unprecedented institutional developments. This democratic transition has potential to reinforce democracy and constitutionalism. In this transition, judiciary's role is unavoidable and revolves around two conceptions: excessive interference in the executive's sphere, creating a potential threat to democratic process. Maximum judicial autonomy, that can help ensure institutional compliance to the Constitution. Considering the past experience, the affirmation of optimum autonomy can be turned around and can be used against fragile government. For consolidation of democracy, Pakistan needs durable representative institutions with strong governing capabilities to rein in entrenched military transformative preservation.

## SUGGESTIONS AND FUTURE RESEARCH

Keeping in view the findings of this research, with the alternative regime shift between military and the civilian government, the democratic transition has been facing so many challenges for consolidation of democracy and constitutionalism. However, these challenges are not absolute in nature. The democracy has been passing through an evolutionary process where every state organ will take a reasonable time to identify its limits of authority. Considering the overall development of constitutionalism in Pakistan, democratic transition should less base on the imposition of constraints and more on self-realization of its constraints. The problems associated with these challenges can be transformed into opportunities for long term democratic consolidation and constitutionalism. The following are some practicable suggestions that could help promote transition of self-realization of institutional constraints:

### 7.1. INSTITUTIONAL REFORMS

Developing democracies like Pakistan, where democratic norms are not well established and where Military and its affiliates are well-entrenched, institutional reforms can help diminish interbranch conflicts and can facilitate their smooth functioning. The followings are some categorical reforms, which should be considered with the broader perspective of constitutionalism:

#### 7.1.1. Judicial Reforms

An impartial dispensation of justice is directly and indirectly associated with the appointment, removal, tenure, and security of the judges. In the USA, there are

different mechanisms for the appointment of judges: the federal judges are nominated by the President and confirmed by the state. At the State level, judges' appointments are made either by the Judicial Nomination Commission, where the Commission sends three nominations to the State Governor who has discretion to confirm one out of the three nominees or judges are appointed through Judicial Election, which is also termed as partisan election. Unlike the USA, in Pakistan judges are appointed by the judges. The government initiated the institutionalization of the appointment process, in order to replace an individual appointing authority with an institution to ensure its participation in the appointment process. The judiciary, however, considered it encroachment upon its autonomy.

Keeping in view the above two models of appointments, the federal judiciary in the USA shares no role in the judges' appointment. On contrast, the Supreme Court of Pakistan shares maximum role in the judges' appointments. Moreover, all these appointments are made on political basis, where judges can easily make an alliance, manipulate the court, and can use this prestigious forum for personal or political gains. At this point, there are two main considerations: institutionalization of the appointment process, ensuring equal representation of both judiciary and government. The dilemma of political appointments is one of the challenges, where the candidate usually belongs to a political party, necessarily protects his party's interest, which may contribute to bias judgments. Political affiliations of candidates can be diminished by introduction of certain standards and qualifications for the candidates' eligibility.

The tenure and removal from office are also contributing factors in manipulation of adjudication. In the USA, the judges have security of lifetime tenure and can be removed from office only through impeachment, followed by a trial in the

Senate. Nevertheless, the retirement age in Pakistan for the judges of the Supreme Court and the High Courts are sixty-five<sup>636</sup> and sixty-two<sup>637</sup> years respectively. Further, Supreme Judicial Council<sup>638</sup> has been constituted for judges' removal. The Supreme Court of Pakistan, however, recently removed over hundred judges of the superior courts without referring that to the Supreme Judicial Council. Similarly, the Judicial Commission of Pakistan Rules, 2010 authorizes the Chief Justice to initiate a vacancy in the Superior Judiciary, which makes his role more influential both inside and outside the Judicial Commission. This personification of the Superior Judiciary as an institution creates adverse effects on the democratization of the institutionalization.

One of the most important factors in reinforcing constitutionalism is security of the judges. In the USA, the US Martial Service is responsible for providing security to the federal judges.<sup>639</sup> In the US Martial Service, Judicial Security Division is responsible for ensuring safe and secure conduct of judicial proceedings, protection of federal judges, and ensuring protection of the other members of the federal judiciary. In Pakistan, there is no protection to courts' premises, proceedings, judges and their families, which effects judicial autonomy. After lawyers' movement, various pressure groups have been established, which created conflicts between bar and bench. In the absence of an adequate security, these pressure groups can easily manipulate the performance of judiciary. The state must ensure security for ensuring impartial adjudication and protection for the integrity of judiciary as an institution.

The court's populist stance significantly affects its priorities. In the USA, there is no concept of *suo motu* actions, rather the court draw a line of requirement for taking up a matter: a legal dispute between adverse parties under the justiciability

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<sup>636</sup> Article 179 of the Constitution of Pakistan, 1973.

<sup>637</sup> Article 195 of the Constitution of Pakistan, 1973.

<sup>638</sup> Article 209 of the Constitution of Pakistan, 1973.

<sup>639</sup> Both the Federal Judicial System and The Martial Service were established by the first congress in the Judiciary Act of 1789.

doctrine without violation of political question doctrine. In Pakistan, the expanded scope of *suo motu* created a real challenge not only for the other branches of the government, but also for the judiciary itself. The overwhelming scope of *suo motu* diminishes functional capacity of the other organs and consequently creates prospects of interbranch conflicts. Within judiciary, it has been complicating the dispensation of justice. The Superior Courts are taking cognizance of cases not only in matters of public importance and fundamental rights, but also in political matters, pure executive, and matters concerning state security.

The cognizance of such matters not only complicates the institutional functioning, but also imposes financial and other liabilities on the country. Because of upholding political cases, judiciary considers itself as an arbiter of the political controversies, true representatives of the populous will, and resultantly escalating conflicts with Parliament. Regular cases, which have been instituted by people with a hope of adjudication within a reasonable time, remained pending because of courts' involvement in the political and *suo motu* cases. Courts should keep a reasonable distance with media and public gatherings, judges should speak by their judgments not by other mediums and need not justify their impartiality through press conferences and media briefings. The superior judiciary should focus on bringing reforms in subordinate judiciary. The domestic courts have been facing so many challenges, which affect the overall administration of justice: disproportionate between judges and pending cases, lack of professionalism and legal skills, insufficient staff and resources, budgetary constraints, corruption, insecurity of person and family, and influence from the Superior Judiciary, politicians, and bar. Instead of preferring political and *suo motu* cases, the Superior Judiciary should focus on the

aforementioned challenges, in order to mitigate these problems and earn a repute title for the judiciary.

#### **7.1.2. Executive Reforms**

In the democratic transition, the executive branch of the government shares an inevitable role, which is motivated and predominated by so many factors: disproportional institutional growth, structural issues, media, political influence, merit, corruption, and duplication of efforts. The Superior Courts take *suo motu* action in the default, excess, or misuse of authority by executive. The executive functioning is directly linked with these motivating factors. Within the executive branch, disproportional institutional growth is prevailing, which is coupled with structural issues. Some departments are unnecessarily strengthened at the expense of the other departments. On contrast, some departments are undermined and compelled to recognize the overstretched authority of the other departments, having no specialized knowledge and skills to administer the affairs of that department.

In the civil bureaucracy, the District Management Group (DMG) now termed as Pakistan Administrative Services (PAS), influences the whole bureaucratic structure. Being an elite cadre of the Civil Service of Pakistan, the PAS heads most of the ministries, including those where specialized and technical skills are required such as Audit and Accounts, which consequently affects the overall performance of these departments. Another motivating factor in the functioning of the civil bureaucracy is the role of media. Generally speaking, most of the *suo motu* actions originated their justification from media. The excessive projection of a matter attracts public importance, which compels courts to take cognizance without realizing its authenticity. Most of media news and stories are not necessarily fair, impartial, and

authentic, rather motivated by personal whims, entrenched military or any other antidemocratic discourse to further undermine the fragile civil institutions.

The civil bureaucracy is headed by the politicians who influence its functioning at all levels. The elected representative, either for personal motives or to oblige voters, manipulates the civil administration. In different matters, the civil servants rely on the politicians such as appointment, transfer, and posting. This dependency has not only affected merit system, but also affected impartial performance of their duties. Likewise, corruption is one of the emerging challenges in discharge of the executive functioning. Usually, corruption is motivated by insufficient pay packages, which is not corresponding to the inflation rate, and clerical mindset at the root level of the bureaucratic fabric. Lastly, duplication of efforts in investigation of criminal cases is a challenging factor for the executive functioning both in terms of time and resources. Due to lack of clear mandate and intelligence sharing, various departments consume their time and resources on the same agenda, which hinders not only their smooth functioning, but also creates interdepartmental jurisdictional conflicts.

The government can strategically overcome these challenges. The disproportion among the departments can be diminished by providing equal opportunities, resources, and mechanism for effectuating their performance to harmonize interdepartmental imbalance. The role of media can be customized positively if Pakistan Electronic Media Regulatory Authority (PEMRA) effectively performs its regulatory duty. Print, electronic, and social media should not be allowed to be used as a tool to derail the democracy, rather these forums should be utilize for promoting and reinforcing democratic norms. The government should appreciate

constructive and productive criticism, but it must not tolerate criticism for the sake of criticism.

The government should encourage merit and diminish political influence in the executive functioning, which adversely affects the overall performance of the government and provides leverage to judiciary to take *suo motu* and encourage antidemocratic discourse to challenge the writ of the government. Like judicial officers, the government should revise incentives for the civil servants, in order to meet their basic necessities. Finally, duplication of efforts can be diminished by clearly demarcating departmental mandate, encouraging interdepartmental intelligence sharing, and mutual cooperation. All these considerations can help improve executive performance, ultimately leaving positive impacts on democratic transition, democratization of the institutions, and the constitutionalism. Where an executive performs its duties upto best of its capabilities, there would be less room for judiciary to interfere.

#### **7.1.3. Parliamentary Reforms**

In the institutional reforms, the most challenging task is reforms in the representative institutions. Political instability and alternative regime shift undermines institutional architecture, which creates dilemma and uncertainty regarding constitutional functioning of state organs. The government must ensure to uphold supremacy of Parliament. This supremacy, however, is not necessarily subjected to undermine other institutions, rather contingent upon reinforcing the institutional structure. Taking advantage of the institutional conflicts, Military has directly ruled this country for more than three decades and had transformed and preserved its authority even in the civilian governments. After the latest constitutional

developments, whereby the extraconstitutional actions had been rolled back to a great extent and provided constitutional safeguards against further Military interventions. Military and its affiliates are using indirect means to manipulate democratic process: electronic and social media, opposition parties, religious groups, and business community are being used as proxy tools to pressurize and expose the civilian government.

Unlike Pakistan, the US government has strong control over the armed forces, which prevented Military's intervention in their political affairs. The US President is also the Commander in Chief of the Army and Navy.<sup>640</sup> In Pakistan's perspective, the suggestion of the executive head as a Chief of armed forces would be very hypothetical and unachievable. The government, however, can utilize to the best of its faculties all the aforementioned proxy tools in its own favor. The government needs not undermine Military rather needs to reinforce judiciary, which previously has been used for validation of the regimes because of its vulnerability. The government must not compromise the supremacy of the Constitution at any cost. Strengthening judiciary as an institution will help uphold democracy and supremacy of Parliament. For consolidation of democracy, the government must ensure compliance to the following matters: a democratic approach to policymaking, particularly foreign policy should reflect public inspirations and should take military on the same page. Unlike personification of institutions where individuals are empowered at the expense of institutions, upholding democratic values in the representative institutions will help continue the democratic transition without military intervention.

The civilian government should trust itself to rein in the entrenched Military and its associated interests. The government should adopt the policy of mutual

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<sup>640</sup> Article II, Section 2, Clause 1 of the US Constitution.

existence, cooperation, and should discourage confrontation. Currently, the government should reverse two assignments from the Military's domain and assign back to their respective institutions: rangers' deployment and military courts. In *Karachi*, due to law and order issues, the government had handed over civilian control to the rangers. However, rangers' administration for maintaining civilian rule should not be permanent in nature. The government should trust on civil bureaucracy and facilitate police department, in order to discharge its constitutional duty of maintaining law and order situation. Despite of assigning duty to the armed forces to regulate the civilian rule, the government should assist Military to focus on the territorial protection of the state and cross-border terrorism activities from India, Afghanistan, and Iran.

The other challenging task for the government is not to further extend military courts, rather to facilitate judiciary so as to perform its constitutional duty to administer justice. This initiative has two pronged outputs: ensuring protection of constitutional right to fair trial and due process of law, which is lacked in military courts. Reposing public trust in judiciary is required both for its integrity and sovereignty. Due to some unavoidable reasons, the trust of impartial adjudication in heinous cases of terrorism has been shifted to military, which has been projecting itself as a symbol of state security and its existence. In the criminal justice system, the police and prosecution departments shares coequal role with judiciary. Without bringing effective reforms in these two departments of the executive branch of the government, the administration of justice is unattainable. It is highly recommended to make the police department more resourceful to combat heinous criminals and to hinder their sophisticated criminal activities. In discharge of its constitutional functioning, the government should provide security to the judges and their families

so as they may adjudicate upon the terrorism-related cases after completion of all legal formalities. These reforms will ultimately help strengthen the representative institutions, restore judiciary's confidence, streamline Military's functioning, and consolidate democratic transition that is the ultimate objective of constitutionalism.

Besides institutional reforms, there are certain other suggestions, which can help promote consolidation of democracy and constitutionalism in Pakistan:

## **7.2. PUBLIC AWARENESS AND EDUCATION**

Public awareness is a best tool to keep institutions in their respective spheres. In constitutional paradigm, elected representatives represent the populous will. Public distrust in executive and Parliament ultimately force judiciary to take *suo motu* actions, military intervention, and public acceptance of such extraconstitutional actions. This public discourse is motivated by so many factors: poor performance of the civilian institutions, lack of good governance, lack of public inspiration in the policymaking, misappropriation of tax money, representatives' inaccessibility to public, frustration from traditional judicial system, sense of insecurity, law and order situation, discrimination, and lack of basic necessities. Military and its affiliates have best utilized this discourse that not only justified their direct rule for more than three decades, but also transformed and preserved that role in the civilian governments. The government should help realize people the constitutional mandate of state organs. In order to repose public trust in the civilian government, public awareness and reforms in the representative institutions is indispensable.

### **7.3. ROLE OF PRESS AND MEDIA**

Public discourse is directly associated with media. Media, which constitutes itself as a fourth pillar of the government, shares a significant role in the evolution of democracy. Generally, it is presumed that media represents public opinion. In fact, people speak whatever media projects. Print, electronic, and social media are modern day weapons to manipulate public discourse. Both Military and judiciary discourage criticism, whereas the politicians and representative institutions are open to public criticism. While utilizing media as a forum, the entrenched forces are facilitating antidemocratic discourse at the expense of the fragile civilian government, which is making part of the public perception. With proper and effective regulation, the government can roll back its negative projection and can mobilize media as a forum for propagation of its positive image that would ultimately help develop a democratic public discourse for enduring constitutionalism and consolidation of democratic transition.

### **7.4. DEMOCRATIZATION OF THE INSTITUTIONS**

The prevailing institutional culture protects individual interest against the institutional interest. Within institutions, individuals are getting stronger at the expense of the institution. This personification of institutions can be corresponded to the autocratic regime, where powers are concentrated in an individual despot with apprehension of its misuse. Similarly, if judiciary, executive, and legislature as institutions protect and empower individuals' interest, it will make despots within the institutions, creating prospects of whimsical use of authority. For the consolidation of democracy and constitutionalism, the government should transform individuals' authority to the institutions, in order to promote democratic norms within the

institutions. Strong institutions, not individuals, can resist and rein in entrenched military and its affiliated interests.

#### **7.5. STRICT COMPLIANCE TO OATH AND CODE OF CONDUCT**

All the authorities, including Military, judiciary, and legislative authorities, should comply with oath and code of conduct of their respective offices. Both necessarily entails and implies to uphold the Constitution, rule of law, and supremacy of Parliament. An individual who transgresses or otherwise utilizes his authority for any extraconstitutional or antidemocratic action amounts to deviation from oath and code of conduct. By ensuring strict compliance to oath and institutional code of conduct, interbranch harmony and their working environment can be improved, which eventually helps institutional infrastructure and constitutionalism.

#### **7.6. POLICYMAKING AND PUBLIC INSPIRATIONS**

For long-term consolidation of democracy and constitutionalism, the government should devise policies according to public inspirations. The institutional, internal, and foreign policy must reflect the popular will. Most importantly, both Military and the government should be on the same page while designing foreign policy. Being an Islamic ideological state, the people are very sensitive about religion, Kashmir, and Palestine issue. The government's policies in these matters must not contradict public sentiments, which could lead to civil disobedience and could motivate extralegal discourse. Similarly, the government should have institutional policies, which clearly demonstrate that how government resources would be utilized for public welfare, including expeditious justice, health, education, infrastructure, and

provision of other basic necessities. Such durable and visionary policies will help develop a pro-democratic discourse.

## **7.7. STRENGTHENING REPRESENTATIVE INSTITUTIONS VIS-À-VIS MILITARY**

The government has been facing so many challenges such as law and order situation, terrorism, political instability, institutional conflicts, and institutional disequilibrium. All these challenges revolve around institutional disproportion. Some of our institutions are very strong and some are made and represented so weak that they are not able to deliver according to their constitutional mandate. This institutional imbalance created public distrust in the representative institutions, which encouraged the powerful institutions to substitute the civilian government.

For a successful democratic transition, the government must reinforce its institutions. Further, the government should facilitate and should make the civilian institutions resourceful so that they may combat the modern and sophisticated means of crimes and terrorism related activities. In prevailing institutional architecture, Military is the strongest institution, both in terms of resources and performance. Rolling back its authority can further deteriorate the situation for Pakistan has been facing external and integral threats. Strengthening other institutions will not only help fragile institutions in restoring their confidence, but will also reduce Military's burden of civil administration. The institutional equilibrium helps institutions discharge their functions smoothly, without overstretching its authority and without any such fear from other state organs, which is the ultimate objective of constitutionalism.

## **7.8. DEMOCRATIZATION OF CONSTITUTIONAL FUNCTIONING**

Despite the fact that Pakistan has been following the US constitutional doctrine of separation of powers and system of checks and balances, the application of trichotomy of powers in Pakistan could not receive that appreciation. Even though, the Constitution envisages the trichotomy of powers and the Supreme Court of Pakistan has also endorsed division of state authority in three branches of the government: judiciary, executive, and Parliament.<sup>641</sup> Nevertheless, the demarcations of these functions are not clearly articulated, which create institutional conflicts. The underlying objective of separation of powers and system of checks and balances is to help each organ identify its constitutional limits, accept existence and jurisdiction of other state organs, restraint its own authority, keep surveillance on others so they may not transgress their authority, and not to hinder their functioning. The statutory interpretation of trichotomy of powers would not only help identify their institutional limits, but would also help improve their functional mechanism.

## **7.9. SELF-REALIZATION OF CONSTRAINTS**

In the transition of institutional demarcations, self-realization of constraints can play a significant role to comprehend the spirit of constitutionalism. The state organs share coequal status and no organ dictates or imposes restrictions on other, rather shares authority for ensuring state functioning and public welfare. For instance, in the USA the judiciary imposed certain constraints on its authority and sketched a line of requirements for entertaining a case: there must be some legal dispute between the adverse parties. While complying with the justiciability doctrine, the US courts refuse to hear political disputes and prefer such disputes for political resolution under

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<sup>641</sup> Sayyed Yousaf Raza Gailani v. the Registrar of the Supreme Court, PLD 466 (SC 2012).

political question doctrine. All these judicial standards are the outcome of judiciary's self-realization of its constraints. In Pakistan, the state organs have been passing through its transitional phase of development where organs will take a reasonable time to realize their working-boundaries. The sooner these organs realize their maximum constraints, the more realistic and progressive would be the democratic transition and constitutionalism.

Finally to conclude these suggestions, in the prevailing transition, where both judiciary and the civilian government were committed to reverse the extraconstitutional actions, simultaneously embarked upon other challenges: after *Musharraf's* regime, the court not only asserted autonomy from military, but also sought autonomy from the civilian government. The government reverse *Musharraf's* extraconstitutional legacy and realized constraints on judiciary, which the latter considered attack on its sovereignty. Consequently, both these institutions started another journey of confrontation. Like Parliament, judiciary claims itself as representative of the popular will and its excessive activism not only affects working mechanism of other state organs, but also impacts its own institutional functioning and integrity.

In order to make this regime-shift a successful democratic transition, structural and other necessary reforms are inevitable: Judiciary as an institution faces so many challenges, which needs to be addressed in collaboration with the government. Within those challenges, judiciary should ensure strengthening its institutional democratic values against the individuals' interest, in order to avoid individual's influence inside the institution. Besides *suo motu* actions, the judiciary should take all necessary steps for ensuring availability of justice to common people. In the executive branch of the government, there is disproportion among various departments, which is coupled with

structural issues, unavailability of resources, and futile exercise of resources and time due to duplication of efforts. External influence from media and politicians adversely affects its functional structure.

The government needs to promote democratic culture, which revolves around the institutions and not essentially empowering individuals at the expense of the institutions. The government needs to make the representative institutions strong enough to rein in the entrenched military and its transformative preservation. The government should focus on the uplifting of the institutions and should not necessarily undermine Military. Let the institutions perform their constitutional functioning. These institutional reforms are directly and indirectly associated with public awareness and education, role of press and media, compliance to oath and institutional code of conduct, policymaking according to public inspirations, reinforcing and equalizing institutions, democratization of functioning, and self-realization of constraints. The loopholes and challenges associated with the prevailing regime-shift can be transformed into opportunities for long-term democratic consolidation and constitutionalism. In order to transform these challenges into opportunities, all branches of the government should share their individual as well as collective role.

#### **7.10. CONTRIBUTION**

This research contributed application of theoretical framework of self-realization of constraints, with special reference to *Thayerian's* judicial self-restraint.<sup>642</sup> In Pakistan's perspective, prior to this endeavor, literary contribution in the context of judicial self-restraint has never been made. Among other judicial virtues, judicial self-restraint refers to structural relation between judiciary and

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<sup>642</sup> James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, *Harvard Law Review*, Vol. 7, No. 3 (Oct. 25, 1893), pp. 129-156.

other branches of the government. The researcher, with the help of leading constitutional cases and constitutional development, highlighted judicial efforts in realization of its constraints and its struggles in ensuring its autonomy from other state organs, including military and invalidation of its extraconstitutional discourse. The Superior Courts while validating extraconstitutional military actions, circumvented unbridled military interventions and strengthen the political regimes.

After its restoration in March 2009, the judiciary not only ensured its autonomy from the military and its affiliates, but also extended the same attitude towards Parliament. The judiciary widened the scope of *suo motu* jurisdiction and took cognizance of the issues, ranging from mega corruption cases to very petty nature of cases that in turn earned populist stance for judiciary. However, the prevalent judicial activism brought about so many implications: further undermined fragile civilian government, created distrust in the representative institutions, created prospects of its conflicts with international legal instruments already ratified by government of Pakistan, imposed huge financial liability to public exchequer, shook its own credibility in terms of its functioning, non-delegation of authority to the district courts and lack of reforms in the conventional justice system. Despite the fact that absolute autonomy is against the spirit of constitutionalism, it is realized that Pakistan's judiciary lacked real autonomy both in terms of independence and integrity.

The concept of judicial autonomy is neither absolute nor constant end in itself; rather it is the outcome of its relationship and dependence on other state organs. Judiciary is meant to serve other normative objectives such as democracy and constitutionalism. For successful transition of constitutionalism, a balance between judicial autonomy and judicial constraints is inevitable, which is subject to various

considerations such as judicial administration, its institutional composition, appointment, and response to judicial decisions. The recent move towards judicial autonomy is a positive step, provided that judicial activism should not transform into judicial imperialism. In order to make this transition a success, application of two considerations must be insured: de-politicization of the superior judiciary and elimination of graft at all levels through judicial reforms. Despite of its confrontation with other governmental branches, the judiciary should ensure functioning with mutual cooperation and coordination, in order to foster public welfare for which judiciary as well as other public institutions laid their foundations. Instead of creating hindrances for each others, each state organ should acknowledge the very existence and sovereignty of other state organs. Simultaneously, each organ should realize the limits within which to allow itself for control by the other state organs and the limits within which to keep check on the other state organs.

The excessiveness of judicial activism may push the country to another complicated regime of activism, which may be somehow identical with military regimes, whereby the civilian government may be dysfunctional and judiciary could virtually assume the executive authority so as to run the state affairs. The prevailing transition could be rationalized with a potential for enduring foundation for democracy and constitutionalism. In the given context, the institutional identity of judiciary that travels beyond the notion of judicial independence and assumes maximum autonomy is considered preferable. The normative discourse of judicial role revolves around two basic conceptions: excessive judicial intrusion could be a potential threat and maximum judicial autonomy provides a basis for hope, which can help ensure institutional compliance to constitutional mandate. However, the philosophy of optimism and over-ambitiousness are barely succeeded. In such case,

the assertion of maximum judicial autonomy can be manipulated against fragile democratic process. A fully independent judiciary without an adequate balance between its sovereignty and constraints can create threat for constitutionalism. In order to make a successful transition of constitutionalism in Pakistan, it is suggested to draw a rational compromise so as to strike a balance between judicial autonomy and its constraints. The judicial self-realization of restraints, which has been considered as passive virtue, should be exercised actively by the judges in their individual as well as institutional capacity. Instead of going to further confrontation with each others, both Parliament and judiciary should realize their constraints so as to identify the extent to keep surveillance on each others, which is the ultimate spirit of constitutionalism. In the prevalent transition, the success and failure of constitutionalism is contingent upon self-realization of constraints: the sooner the state organs realize their bounds, the more successful constitutionalism would be.

## **7.11. FUTURE RESEARCH**

The concept of constitutionalism and its associated dynamics are significantly changing with the passage of time according to needs of society. The developed countries have their own constitutional and democratic indicators to which the scholars have already contributed to a great length. For the developing countries, these indicators may be varied, but sharing the same objectives of how to constraint, transfer, and regulate the government's authority. Despite utilizing all possible faculties, the scholar realizes potential for further research. The power struggle between various branches of the government remained constant. In a broader context, in both developed and developing countries constitutionalism and democratic

transition are vulnerable to certain challenges, with the same nature of problems with different magnitude.

With the regime-shift in Pakistan, both judiciary and Parliament as institutions not only strived to restore public confidence, but also to ensure its sovereignty. Judiciary projected itself more powerful and independent. The government was committed to impose modest constraints on judiciary. On the basis of its self-conception of autonomy, the court not only reversed all those efforts, but also interfered with the core political issues considering itself representative of the popular will. Consequently, another confrontation, the similar conflict of power struggle with different magnitude has been emerging. Even a democracy languishing between Military and other challenges, keeps progressing two steps forward one step back. With the evolution of democratic transition, this field provides opportunities and explores more avenues for further research not only for legal fraternity, but also for other disciplines.

Lastly, Pakistan's recent shift to civilian government has evident unprecedented political and institutional development, which is contrary to the previous longstanding narratives of permanent crisis and imminent failure. This shift has potential to lay an enduring foundation for the consolidation of democracy and constitutionalism. Nevertheless, this democratic transition is expected to be more challenging. Unlike conventional political and constitutional change, this transition depends upon effective challenge to the entrenched Military, which is backed by a range of actors, where Judiciary stands with no exception. The prevailing role of judiciary and its institutional identity claims maximal autonomy, which is a potential threat to diminish or interfere with democratic governance. Pakistan's long standing experience with judiciary suggests a rational compromise between judicial autonomy

and its constraints. Logically speaking, assertion of optimum judicial autonomy against fragile civilian institutions can further weaken the institutions and strengthen the existing well-established power of the status quo interests. This current shift inevitably requires institutions with strong governing faculties to rein in those well-established status quo interests. Keeping in view the broader applicability of the regime shift, this research can help other countries, living in the same gray zone of democratic transition and regime shift, to learn from Pakistan's experience and to follow a more successful and rationalized shift towards consolidation of democracy and constitutionalism.

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