

Paradoxes of Judicial Independence: Issues and Challenges of Constitutionalism in Pakistan

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ABSTRACT

Pakistan has oscillated between weak civilian rules and military regimes throughout its history. Military co-optation with the judiciary, alongside few exceptions commenced an era of dissolutions in 1988. This led to develop an institutional imbalance which undermined the representative institutions by upholding the presidential orders to dismiss federal and provincial assemblies in Pakistan. The judiciary in Pakistan largely remained a reactionary institution as it endeavored for the self-preservation rather than upholding the constitutionalism and enforcing the rule of law. Judiciary's political assertiveness during the decade of 1990s by addressing the political questions led to decline of its impartial character. This research expounds that judiciary's informal support for military increased the federal challenges of Pakistan and enhanced the authoritarian features of the state. This paper also explicates that by validating the dismissals of the representative institutions and authorizing the military regimes to amend the constitution, Judiciary compromised its judicial independence, which is one of the salient features of Constitution of 1973. Keeping in view the nature of case study and employing qualitative approach of research, this paper largely addresses the key question that how judicial Independence is relevant to the issues of federalism and democracy in Pakistan.

Key Words: **Judicial Independence, Federalism, Pakistan, Civil-Military Relations, Democratization, Constitutional Development.**

Introduction

In any federal state, constitution is the defining feature of federal polity that stipulates the federal structure, functions, powers, realm and limits of federal institutions while establishing a federal balance between the federal organs by prescribing their constitutional roles. However, this federal balance at times is undermined in the case of suspension or abrogation of constitution. The second most important element in a federal state is supremacy of its federal parliament over other state institutions, generally established by its constitutional powers. The federal parliament generally asserts its primacy through its authority to amend the

respective constitution to ensure the representative nature of federation while enhancing the democratic consensus. The independence of the judiciary is the third indispensable attribute of a functional federation. The role of an independent judiciary is to arbitrate the legal and the constitutional disputes between state institutions, federal units and entities of the federation (Rizvi, 2016). The federation is in fact an agreement between the various political forces having regional, ethnic and linguistic identities, which transforms them into a union by signing an accord. However, division and sharing of powers can lead towards encroachment of one set of government into the sphere of another set of government, which provides grounds for the existence of a federal judiciary, which, in turn, forms its paramount position, can act to discourage any extra-constitutional step and legal and constitutional disputes within a federation. With reference to federal notion, superior judiciary is custodian of the constitution as it protects the respective constitutional status and interests of all the constitutional polities. The underlying study is comprised of following objectives:

- To look into the implications of judicial validation of dissolution orders in relation with the constitutionalism and the supremacy of the Federal Parliament in Pakistan.
- To review the role of the judicial independence as being either judicial autonomy or a major constraint in the federal progression in Pakistan.
- To rationalize the embodiment of lawyers movement 2007, corroborating its pluralistic approach towards power dynamics.

This study is focused to address following primary questions:

- In what ways, paradoxes of Judicial Independence are pertinent to the issues of federalism in Pakistan.
- How did the judicial validation of dissolution orders facilitate non-representative state institutions to assert their influence and role in politics of Pakistan?
- Did lawyer's movement nurture the narrative of judicial activism to solidify democratic norms while instrumentalizing the constitutionalism for the retention of institutional balances?

Methodology

This study is fundamentally qualitative in nature and commenced under a case study design. The case study of 1988-2018 with reference to the judicial decisions, primarily addressing the political and constitutional questions develop foreseeable relation between the independence of the judiciary and its expected role in preservation of the constitutionalism, supremacy of the federal parliament and the federal notion of the state. This research incorporated the secondary sources to gather empirical evidences related to the research assumptions. The existing literature on judiciary in Pakistan largely deals with the legal interpretation of the judgments of respective cases or general description of its political consequences.

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The judicialization of politics is politically constructed; as if political sphere is conducive then it would lead to the judicialization of mega politics (Hirschl, 2004). The existence of political competition is more likely to promote judicial empowerment in a state however; it does not lead inevitably to the judicial independence. The authoritarian states largely lack the institutional arrangements, which might protect judges while enhancing the prospects of the independence of the judiciary (Solomon, 2007). Due to the repeated political shocks by either military interventions or presidential orders, Pakistan has been in 'Gray Zone' for years as country fluctuates between democracy and authoritarianism. The judiciary largely supported authoritarian tendencies while validating the military interventions and on other hand played an analogous role during civilian rules by validating the dismissal of federal and provincial assemblies (Kalhan, 2013). In both cases, judiciary's legal discourse reinforced military and executive ascendancy over federal legislature. Through the powers of constitutional review, judiciary not only mediates between the political actors but also limits the arbitrary use of government power. The institutionalizing of rule of law by judiciary establishes that legal boundaries of a political system cannot be contravened for partisan political advantages (Larkins, 1996). On the other hand, the persistence of assertions of centralization by the federal government and demands of provincial autonomy by provincial governments is part of federal bargain in any federation. However, this becomes a problem when the mechanisms (Federal, provincial legislatures assemblies) of conflict resolution in a federation are dysfunctional by dissolutions and Judiciary fails to preserve the spirit of the constitutionalism by legally endorsing either the executive orders or military coups.

The role of the judiciary in the politics of Pakistan was primarily enhanced during the constitutional crisis of 1954. This conflict of asserting authority between the Governor General; Ghulam Mohammad and federal legislature led to the dissolution of the First Constituent Assembly on 24th October, 1954 through an executive proclamation stating that Assembly lost the confidence of people and could no longer function. The verdict of Chief Court of Sindh restored the federal assembly while providing that executive be not authorized to dissolve federal parliament by any provision of law listed in either Government Act of 1935 or Indian Independence Act of 1947 (Maulvi Tamizuddin Khan V. Federation of Pakistan, 1955). However, later the Federal Court upheld the orders of Governor General under the "Doctrine of State Necessity" which shifted the sovereignty from the Constituent Assembly to the executive. The judgment of the superior court provided that Governor General possessed the veto power over the legislation of Federal Parliament. Muhammad Munir; Chief Justice (CJ) of Federal Court acknowledged that the significant consideration for not restoring the first

Constituent Assembly was due to the fact that there was less likelihood of implementation of such a decision by a powerful executive (Khan, 2020). This momentous ruling while legalizing the misuse of executive authority primarily paved grounds for the federal institutional imbalance in Pakistan, where federal parliament remained at the mercy of discretionary powers of the executive in later years. In 'Usif Petal case', a little effort was made by judiciary to constrain the misuse of executive powers as it denied providing the right to Governor General to act in place of the Constituent Assembly. However, judiciary obliged him to call into the Second Constituent Assembly under the directions of the Federal Court (Yusuf, 1998). Pakistani judiciary was characterized by 'Behavioral independence' rather than 'Structural independence' as part of its colonial legacy. This was evident by the decision of Chief Court of Sindh and dissenting note by Justice Cornelius in Federal court verdict (Shah, 2008). The Federal Court judgment in favor of Governor General discouraged the institutionalization of rule of law that was crucial for the democratization in a transitional state like Pakistan.

The political and constitutional co-option of judiciary was extended to the military under Ayub regime (1958-1969). The first military dictator; General Ayub Khan was in the favor of an authoritarian state structure, which was not strongly resisted by the superior courts. Although under his military regime, judiciary was no more a partner in political co-option, it was rather more subservient to military dictator as compared to the era of previous civilian governments. The inability of judiciary to act as a federal institution to keep intact the spirit of constitutionalism; and its powerlessness against military regime was more apparent as court accepted the legitimacy of the martial law imposed on 25 March 1969. Furthermore, there were few exceptions under Yahya regime when judiciary asserted its authority to appraise the judgments of military courts but it was futile. In Asma Jilani case (1972), Supreme Court of Pakistan (SCP) overruled its previous verdict given in Dosso Case and pronounced the assumption of authority by General. Yahya Khan as illegal while declaring him as 'usurper' but this belated condemnation was made only when he was no more in power (Asma Jilani V. Government of Punjab, 1972). Despite adopting a self-correction strategy by SCP in Asma Jilani case by reversing the earlier judgment of Dosso Case in support of democratic principles, independence of the judiciary was not primarily strengthened. The underlying reason was that Pakistani federation was still working under highly centralized and authoritarian state structures (Inayatullah, 1997).

The superior courts also overlooked the federal conception largely with a justification to guard the federal identity accredited exclusively to the "Ideology of Pakistan" and construed the federal values in a way that shattered the federal spirit. The federal government headed by Z.A. Bhutto imposed ban on National Awami Party (NAP) and its affirmation by the court to proclaim ethnicity as threats to the integration of federation was one of such examples where judiciary surpassed its constitutional limits and largely addressed the political questions. (Rahman H, 1976). The judiciary largely ignored the verity that generally a federation comes

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into existence when different groups having significant linguistic, cultural, regional or other identities intend to preserve their distinctiveness despite forming a state for specific purposes. This also provides that Pakistani judiciary's approach towards federalism was analogous to persisted authoritarian state discourses for viewing ethnic and linguistic groups as an emergent threat rather than the strength of Pakistani federation.

The Judiciary gradually asserted its political influence as its broken nexus with the military was revitalized in 1977 when the third military coup had taken place under General. Zia-ul-Haq. The superior courts fully collaborated with Zia regime as CJs of the High Courts acted as Governors in provinces. The SCP as per its historical legacy and 'Path Dependence paradigm' validated the martial law in Nusrat Bhutto case but this time, despite the cooperation provided by the judges to the military regime, judiciary as an institution suffered severe disgrace and degradation. This case was no doubt a historic moment for judiciary to assert its constitutional role to preserve the constitutionalism and democratic practices. However, Judiciary did not consider those apprehensions which itself rose previously in Asma Jillani case about illegal use of power by a usurper. The respective verdict of the SCP was primarily in the favor of martial law on the grounds of 'Doctrine of State Necessity' and welfare of the people (Case Law Nusrat Bhutto V. COAS, 1977). The SCP did not direct General. Zia to hold elections within a specific time limit. The judiciary however encroached into the political domain rather confining its verdict to legal and constitutional interpretation to assess the illegitimate military intervention. The Apex Court's decision undermined the supremacy of federal parliament by providing that the Chief Martial Law Administrator (CMLA) secured the mandate from the public, as they did not resist his administration. State as a political entity primarily becomes unstable when constitution is disrupted and this makes political and federal institutions dysfunctional including the superior judiciary to suffer from uncertainty.

Despite significant concessions provided by the courts to the General. Zia for validation of his regime, a convivial relation was not developed between the executive and judiciary. The SCP partially attempted to assert its independence by reviewing the judgments of military courts and legitimacy of the Zia regime. General Zia clamped these efforts of judiciary by introducing the Provisional Constitutional Order (PCO) where those judges who took the oath under PCO inevitably obliged the regime by legitimizing the said order (Khan, 2020). Furthermore, establishment of the Federal Shariah Court (FSC) by the Zia regime incorporated the idea of 'Presidential Court' where judges' appointments and removal were only made by the President which was divergent from the specific conditions listed in the Constitution of 1973 for the judges of the standard courts in Pakistan.

Role of Judicial Validation of Dissolution Orders in Aid of Non-Representative State Institutions

The independence of judiciary unfolds through its role as a 'neutral third' having no interests in the outcome of the case or litigants. In case of Pakistan, two power centers of state apparatus where one is comprised of military, bureaucracy and judiciary while other is comparatively weaker largely represented by political elite stress the parliamentary sovereignty (Waseem, 2012). The consequences of eleven years of third military rule under General Zia encompassed the institutional imbalance between representative and non-representative state institutions, namely Federal Parliament, military-led establishment and judiciary. The elected civilian rule was revived in 1988 in Pakistan as result of mysterious demise of General Zia in a plane crash, which in turn paved grounds for general elections of 1988. However, democratic norms were not incorporated into the political culture because of authoritarian legacies of previous martial law. In post-Zia period, the elected political leadership largely remained involved into the traditional political rivalries, which provided enough space to military to take advantage of recurring political instability. In post-Zia period, the role of military in politics was not diminished though General Mirza Aslam Baig as COAS (Chief of Army Staff) was not interested to continue the direct military rule. However; he conveyed clearly to SCP that the army would not appreciate possibility of restoration of the previous federal government of Mr. Junejo, in the national and the provincial assemblies. This was the reason that in 'Federation of Pakistan V. Muhammad Saifullah Khan (1989)' notwithstanding with the apex court's view of considering dissolution of National Assembly in 1988 as unconstitutional, order of restoration of respective assemblies was not issued (Paracha, 2016).

The Judiciary in Pakistan has largely confronted multi-dimensional questions during the course of judicial validation of dissolution of assemblies since 1988 and onwards which were largely fitted to the legislative and political domains. These political and constitutional issues were inadequately responded by the Judiciary by employing the supra constitutional theorizing which created more constitutional and legal ambiguities. The SCP evidently remained inconsistent in its constitutional approach by pronouncing contradictory judgments in dissolution cases of assemblies in 1988, 1990, 1993 and 1996. Furthermore, the High Court located in Sindh and Lahore provided different perspectives to the petitioners challenging the dissolution of assemblies of 1988. The Sindh HC was not convinced that it could interfere in the matter, as the court was uncertain about its power of judicial review on presidential decree. On the other hand, Lahore High Court (LHC) found the petition under its jurisdiction. The dissolution of the National Assembly was declared unconstitutional by LHC, though restoration order was not issued. SCP however declined to provide the relief of restoration to the petitioners because court cannot interfere until an action is contrary to or a violation of the Constitution upheld the decision of LHC (Siddiqui, 2006). The

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legal justification for not ordering the restoration of assemblies was unpersuasive and vague as SCP's judgment was based on its observation of the changed political settings in post-dissolution period rather than the legal considerations of the matter. It has been provided that, the independence of the judiciary is significantly associated with its assumed role as a neutral arbitrator where it is neither interested in parties of the conflict nor concerned with the outcome of the case.

There were other important series of constitutional cases where superior court's decisions paved grounds for the party based general elections in Pakistan in 1988, specifically when certain contentious provisions of the "Political Parties Act 1962" were annulled to facilitate democratic process. Although this constitutionally supportive role of judiciary in favor of democratic setup did not sustain much longer, as the Constitution of 1973 was so far characterized by the offending provisions of 58(2B) inserted under previous Zia's regime through Eighth amendment. The respective constitutional amendment primarily empowered executive (President) with discretionary powers to dissolve an elected assembly at Centre through presidential orders and legislatures at provinces through Governors on instruction of president.

The political breakdown and shocks during the decade of 1990s were primarily not caused by the inability of judiciary to safeguard supremacy of the Federal Parliament through its verdicts in dissolution cases. The civilian federal governments and national political leadership also did not make any serious efforts until 1997 to repeal the Eighth amendment. However, the Judiciary and federal parliament both remained unsuccessful to deal with the constitutional engineering of the previous military regime; hence the upshot was dissolution of National assembly in 1990 by president Ishaq Khan that was challenged in 'Khawaja Ahmed Tariq Rahim V. Federation of Pakistan'. The verdict of the court in this dissolution upheld the presidential order to dissolve the national and provincial assemblies. It has been observed that the Apex Court largely failed to examine the accuracy of allegations made by the President over the workings of the federal government as accusations against federal government were largely based on news papers and intelligence reports (Siddiqui, 2006). This decision made many to speculate that the Judiciary is not free to make its verdicts, as previously in Haji Saifullah's case, it was army, which instructed the Judiciary and president to facilitate the democratic setup. However, in 'Khawaja Ahmed Tariq Rahim' case, the court's judgment did not support elected government and legislatures as General. Mirza Aslam Baig and the establishment were not much contented with Prime Minister Ms. Benazir Bhutto especially regarding her approach on foreign policy issues. However, in 1993, Judiciary acted exceptionally by a majority of ten to one in favor of Prime Minister Mian Mohammad Nawaz Sharif when he challenged the dismissal of National Assembly before the SCP.

In 1993 verdict; 'Muhammad Nawaz Sharif V. President of Pakistan', federal and provincial assemblies were restored by providing a judicial commitment to

constitutionalism by determining the matter of dissolution in 10-1 decision. Nevertheless, pledge to the constitutionalism, asserted by verdict of SCP did not sustain too long as power politics in Pakistan was viewed more associated with non-elected state institutions of the army and the presidency. This decision of SCP did not strengthen its role as an arbitrator as this judgment was soon in vain. It is not an exaggeration to claim that COAS brokered an arrangement with the help of president Ishaq Khan that made Prime Minister Shariaf resign and dissolve the NA; however, in this progression the president was also instructed to quit. It is evident that COAS was primarily the most powerful person in the 'Troika' due to his organizational backing from the military through command and control paradigm as compared to the President and Prime Minister for whom political support often fluctuated. Before the hearing of the case of fourth dissolution, 'Mahmood Khan Achazai V. President of Pakistan' (generally known as the Eighth amendment case) was decided by the SCP. The respective petition while challenging the Eighth constitutional amendment argued that it destroyed the inherent structure of the Constitution of 1973. During the hearing of the petition, Sajjad Ali Shah; CJ of SCP clearly condemned the Eighth amendment; however, the later decision was shocking as this judicial verdict confirmed this amendment as a lawful part of the Constitution of 1973 (Siddiqui, 2006). The extra official consultation provided by Chief Justice of Pakistan to appease an executive (either a president in case of dissolution of NA or military ruler in case of a military coup) remained a practice. CJ Sajjad Ali Shah was invited to President House in November 1996 after the dissolution of federal government of Ms. Bhutto and NA to brief him about the reasons causing this decision by President Farooq Laghari. CJ of Apex court primarily overlooked the fact that soon he would be on a bench to hear the case regarding legality of respective dissolution (Shah, 2008). In the backdrop of previous confrontation over judges' appointments between federal government under Ms. Bhutto and judiciary, judicial decision validated the dissolution of assemblies. The apex court upheld the presidential order of dissolution while considering allegations of extra-killings in Karachi, corruption, nepotism and wide scale use of telephone tapping of judges, political figures, high ranking military and governmental officers in violation of 'Right to privacy' under Article 14 of the constitution as valid reasons (Benazir Bhutto V. President of Pakistan, 1998). These were treated as evidences to justify the allegations of total failure of constitutional machinery against both Provincial government of Sindh and Federal government. By upholding the dissolution order in 'Benazir V. President of Pakistan', SCP largely evaluated the political performance of an elected government, which was far beyond its constitutional role. It has also been observed that while hearing the cases against presidential orders of dissolution, most of the time, judges' remarks indicated their pro-democracy stances and commitments to embed the constitutionalism but written judgments were primarily contrasting to their verbal claims.

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The confirmation of dissolution orders by superior court during 1990s undermined the federal parliament by three ways. First, it deprived the federal parliament of its representational right to make Prime Minister and cabinet accountable to legislature. Secondly, political and constitutional issues were addressed outside the federal parliament while providing more leverage to non-representative institutions like military in politics. Thirdly, verdicts validating dissolution orders largely failed to differentiate between the federal parliament and federal government (Falki, 2019). Although from 1972-1999, there were some verdicts of SCP largely produced in post-facto periods called either previous dictator as a usurper or declared the military regime as illegitimate but these judgments by the higher courts did not deter the next military takeover in Pakistan. The reason was that judiciary primarily remained unsuccessful to act as an independent federal institution of Pakistani federation whenever it was the matter of political adjudication.

Narrative of Judicial Activism and Need for Constitutionalism for the Retention of Institutional Balances

The spirit of judicial activism was revived when CJ of SCP; Iftikhar Chaudhry was deposed on 9th March 2007 by President General Pervez Musharraf on the charges of misconduct and malpractices during his office (Emergency to End Judicial Activism, 2007). Abdul Hameed Dogar as an acting CJ succeeded him. This action of the president ensued in rallies, public processions, and demonstrations in favor of the deposed CJ. Most of the senior judges either resigned in protest or boycotted the courts throughout the country. Since March 2007 until the restoration of the CJ, plenty of lawyers' march, civil society protests, and hunger strikes and bar movements with the support of opposition parties were observed. They also castigated the pro-Musharraf judges as collaborators for denouncing democratic trends in Pakistan. These protests caused violent activities from Karachi to Peshawar and death of innocent people aggravated the situation.

The lawyer's movement set an agenda:

- ⇒ To ensure the fundamental principles of parliamentary democracy, pertaining to separation of powers and checks and balance.
- ⇒ Restoration of the deposed CJ.
- ⇒ Disqualification of General Musharraf for holding two offices (Army Chief and President)

The suspension of CJ Chaudhry was proclaimed unconstitutional by the protagonist of lawyer's movement Chaudhry Aitzaz Ahsan. He formally asserted that CJ of SCP was only accountable to Supreme Judicial Council. Throughout this movement, Aitzaz Ahsan propounded that CJ always desisted the non-democratic decisions of the president Musharraf through his suo – moto actions. He stood against the centralized military command in political institutions. General

Musharraf inducted military personnel into civilian institutions to keep a strong hold over, and to undermine, the civilian autonomy. The lawyer's movement developed a narrative that mass mobilization to confront government's dictatorial practices was inevitable. It was not only indispensable for the restoration of judiciary but also for the preservation of popular sovereignty. President Musharraf was viewed as a self-contradictory leader because on one side, he was promulgating the dogma of enlightened moderation but on the other side, he was negating human rights (Shahid, 2007). He aggrandized his powers while manipulating the political forces in Pakistan. He wanted to patronize his cronies in the name of privatization. The activist lawyers expounded that the president had been consistently making the national interest subservient to his personal interests. It embarked on collision between government and pro-democratic forces. Moreover, the defiance of constitutional provisions regarding holding the elections was another onslaught to the people of Pakistan and an obstacle to the participatory political culture. Apart from it, the pro-government political parties (MQM, MMA) also distanced themselves from the government.

On the other hand, the pro-government lawyers rationally held a contradictory perception. They defamed the CJ Chaudhry while condemning his conduct with public authorities, police, bureaucracy etc. They accused him of using extra-judicial powers for his overwhelming intrusions in political affairs. They bolstered the government's stance to break the momentum of the lawyer's community. The proponents were of the view that the CJ made assault on the executive to hegemonize the political process. He demonstrated his preponderance in the state-affairs specially with reference to 'missing persons' case through his aggressive sou-mottos. It discontinued the legislative aggregation along with institutional jurisdiction. This pro-government paradigm instigated the dissidents. They unfolded the incredible plundering of state resources by the president Musharraf. The lawyer's movement had gained much strength in the society that media reported it as an existential threat to General Musharraf (Hussain, 2007).

Lawyer's movement was projected as a milestone to avert military rule in Pakistan and led the people to democratic transition. As time passed, the conflict between dissidents was escalated. The state authorities arrested the political workers, lawyers and civil society activists. Here the most interesting development was observed in terms of the U.S support to Musharraf government. On one side, U.S administration was providing assistance to the military government to contain terrorism but on the other side, she had been emphatic to ensure liberal democratic rule in Pakistan. In this scenario, the model of democracy propped up by Pervaiz Musharraf constrained the participatory political culture. The results of the national, provincial and even local government elections during his rule revived the feudocracy. Moreover, National Reconciliation Ordinance 'NRO'* was the manifestation of Musharraf's strategy of 'controlled democracy'. The role of the prime minister was confined to the dictates of the president. Musharraf also revived 58(2B) under seventeenth amendment in the 1973 constitution. These

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trends promoted more centralization and authoritarianism in the politics of Pakistan and strengthened the centrifugal forces.

In this connection, the most mournful incident occurred on 13th May 2007 with the arrival of deposed CJ Chaudhry in Karachi. There were political clashes and series of violence between the disputant parties. The pro-government establishment (MQM and PML-Q) kept on suppressing the protestors, which caused the killing of innocent people. Sindh provincial government also implicated the CJ for deteriorating law and order situation. These rallies continued throughout the province of Punjab as well. The alleged presence of bar members, political parties (PML-N, MMA, PTI, ANP, and PPP) and civil society vividly displayed the rhetoric for the removal of Musharraf.

The lawyer's movement had taken a new turn while demanding for holding new elections to restore civilian democratic rule in Pakistan. Consequently, the president Musharraf rebuked the opposition. He proclaimed regarding the prevalent conditions as an ethnic and political intrigue against him which provided that the ruling elite miscalculated the implications of lawyers' movement. Even after the restriction on media coverage, government could not contain the deluge of all the segments of the society supporting this movement to foster the process of democratization. This movement provoked that military government had derailed democracy and intended to reduce the role of judiciary to let the authoritarian forces to breach the democratic values and constitutional law. Moreover, the Lal Masjid (Jamia Hafza) operation in July 2007 by the government created more troublesome situation. The Lal Masjid clerics overtly advocated overthrow of the government (Siddique, 2008).

The struggle of the lawyers continued and culminated in the restoration of the deposed CJ Iftikhar Chaudhry in July 2007. Jurists also emphasized that the "parliamentary judicial committee" was supposed to appoint the judges in order to have transparency in the judicial system. It was also obligatory to prevent the executive influence. The triumph of CJ enfeebled the moral and legal narrative of Musharraf regime. Afterwards the CJ kept on taking decisions in the public interest. After his rehabilitation, he manifested that the sitting government would have to co-exist with the independent judiciary (Bhatti, 2007). Intervention by the courts regarding the missing person's case was also the evidence of judicial activism. Before the dismissal of the chief justice, thirty three out of forty-three persons had been recovered. The court also declared that the affected families would have to be compensated.

The CJ Chaudhry also heard a "suo moto" case to control price hike in the country. Another "suo moto" was taken against the attack on the procession of Pakistan People's Party on the arrival of Benazir Bhutto* to Sindh. Then the most critical case was heard by the CJ regarding holding two offices by Pervaiz Musharraf as army chief and the president of Pakistan. The president's lawyer Sharifuddin Pirzada expressed that president would quit the office of army chief

when he would be re-elected as the president. In the backdrop of all these developments, the most surprising occasion was the compromise between MMA and Musharraf through the approval of seventeenth amendment in the 1973 constitution.

Dogar court endorsed all the initiatives taken by the president. Nevertheless, Iftikhar Chaudhry kept on taking “suo moto” actions against all the irrational decisions by the government. Both the incumbent chief justices had divergent adjudication. Apart from it, all the segments of the society supporting the lawyer’s movement diverted to demand for holding general elections. Widespread chaotic situation in the country, suicidal bombing, protests, and demonstrations led Musharraf to impose emergency under article 232 of the 1973 constitution. Nevertheless, opposition parties pressurized the government to conduct elections to reinvigorate parliamentary democracy and to avoid emergency circumstances. Side by side, the court’s verdict in favor of Nawaz Sharif and Shahbaz Sharif to return to Pakistan paved a way to electoral politics. PML (N) and PPP mutually had signed Charter of Democracy to flourish democratic political system in Pakistan. However, Musharraf was conditionally inclined to hold elections. He desired to be re-elected as the president of Pakistan and got the approval of his nomination paper from Election Commission.

In the due course of time Musharraf resigned as an army chief on 25th of November 2007 and General Ashfaq Parvaz Kayani became the new army chief. Emergency was lifted on 15th December 2007 and elections were scheduled on 18th February 2008. The paramount personalities of this movement i.e. Aitizaz Ahsan, Ali Ahmad Kurd and Munir .A. Malik claimed that the mass support to their struggle decided the civil-military relations for the last time. The new coalition partners (PPP and PML-N) also manifested their commitment to democratic political culture while passing the eighteenth amendment to the 1973 constitution.

Moreover, the government also made nineteenth amendment to ensure independence of judiciary. This amendment was aimed to empower the judicial commission and to promote collaborative working between parliament and the judicial body. Despite this fact, the judiciary and executive both had tensions over the issues like NRO and corruption cases i.e. Swiss Account of President Zardari. Judiciary pursued its independent position in order to postulate rule of law. In case of Swiss Accounts, the incumbent Prime Minister Syed Yousaf Raza Gillani was penalized and replaced by Raja Pervaiz Ashraf. Apart from flourishing democratization, judiciary magnified herself as the watchdog of state resources.

The CJ took “suo moto” against the privatization of Pakistan Steel Mills during Musharraf regime and the Qadirpur Gas Fields during PPP government (2008-13). Indeed judiciary reinforced the precept of pro-activism while reviewing the executive decisions. It contained the use of unaccountable authority by the executive and held the government responsible to the popular will. It helped to maintain the phenomenon of institutional jurisdiction and provided the justification for democratic – liberal jurisprudence. Although the pro-government lobby was

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raged and hence, indicted CJ Iftikhar Chaudhry to have encouraged discriminatory justice to aggrandize his powers in Law Review reference. Nevertheless, along with all these controversies, the superior courts remained intact to ameliorate the dynamics of state structure.

The analysis of lawyer's movement manifested the theoretical and structural discord between judicial activism and judicial restraint. The dynamics of this controversy kept on changing with the passage of time. Some of the political forces that were initially supporting the agenda of lawyer's movement, later coming into power, gave up to bolster judicial activism when they found it beyond their priorities. However, lawyer's movement developed a synthesis between state and society in terms of judicial logic and social precepts. Judiciary evidently provided the cognizance for judicial review of social and political realities.

Conclusion and Epilogue

This study concludes that nature of democracy and extent of military role in politics shaped the disposition of judicial independence in Pakistan. However, under authoritarian state discourses and practices, the respective factors considerably led to provide grounds for a submissive role of judiciary under military rules, as well as, politicization of judiciary under civilian setup in the past. This study pronounces that under a military-led regime or in case of absence of functional democratic political system, judiciary alone cannot ensure its independence while conserving the essence of the federal constitutional framework especially when either constitution is in abeyance or abolished. It is apparent that federal notion would be nominal at functioning level under authoritarian governments as judicial substantiation of extra constitutional steps provides fewer chances for the consensus based federal practices in Pakistan. Under centralized and authoritarian governments, largely controlled by military-led establishment, strong personalities and non-representative state institutions, judiciary in Pakistan remained less institutionally empowered to proclaim its independence and due constitutional role.

The role of judiciary in Pakistan for most of the years confined to the continuous alterations between judicial activism and politicization rather than judicial restraint and independence. However, the judicial transformation caused dilemma of democracy in Pakistan. It is evident in the recent past due to the disqualification of elected Prime Ministers Yousaf Raza Gillani and Nawaz Sharif in 2012 and 2017 respectively. Although, they were guilty with the charges of constitutional defiance based on Article 62, 63 in the 1973 constitution of Pakistan, but their disqualification raised a question on the credibility of the democratic forces in Pakistan. This emerging trend of activism in judiciary endorsed the fragility of parliamentary sovereignty and public will. Moreover, the "Panama Papers Controversy 2016" (leaked by International Consortium of

Investigative Journalists) which highlighted the details of overseas assets of various political leaders accentuated the phenomenon of judicial activism in the state structure of Pakistan. Apart from it, the mass-mobilization against the controversial Election Act 2017 on the issue of submitting affidavit to declare the finality of Prophet-hood (PBUH) along with nomination papers also triggered for judicial interference. Superior courts politicized the incumbent government. Afterwards, the current political turmoil in Pakistan enhanced the role of judiciary in politics ranging from the disqualification of Hamza Shahbaz as Chief Minister of Punjab to the relief in NAB (National Accountability Bureau) cases for various government officials. Particularly, the reprieve for popular opposition leader Imran Khan in different political cases magnified the role of judiciary.

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