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## JUDICIAL ACTIVISM, SELECTIVISM, AND EXECUTIVE'S FUNCTIONAL SPACE: A CRITICAL APPRECIATION IN THE CONTEXT OF PAKISTAN

### Abstract

*In constitutional history of Pakistan, judiciary significantly contributed in shaping and re-shaping of state organs. After restoration of de jure judiciary in 2009, it has exceptionally secured autonomy from military as well as civilian governments. The emergence of proactive judiciary divided legal scholarship into two competing discourses: proponents and opponents of judicial activism. The proponents justified this judicial activism for democratic consolidation and constitutionalism whilst the opponents considered it as a tool to undermine civilian government at the expense of its autonomy with the help of selective adjudication. Excessive judicial activism creates impediments for other state organs and may create public distrust in elected representatives at the cost of nonelected despots. The research at hand aims to investigate both these concepts with the help of qualitative research methodology and identifies potential issues associated with the prevalent institutional transition. The research suggests how these two extremes regarding judicial activism could be adjusted through logical interpretation of the arguments with the help of more convincing hypothetical assumption, avoiding prospects of institutional disequilibrium.*

**Keywords:** excessive judicial activism, selective justice, favoritism, executive, government, military

### 1. Introduction

In 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 article analyzes how 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.

The operational framework of the research has broadly been categorized into the following segments: in first segment, an overview of military's influential role and state organs' response thereto has been examined. In second segment, judicial activism and selective adjudication has been explicated with the help of case laws. In third segment, judicial and governmental efforts for rolling back extra-constitutionalism have been elucidated. In fourth segment, hypothetical assumption regarding judicial activism – a way forward and how it narrowed down functional space for other state organs have been exemplified. In last segment, the research has been concluded with some logical and convincing arguments regarding proponents and opponents of judicial activism and suggests how it could pave ways for another journey of confrontation among state organs: authoritative role of military could be replaced with judiciary and civilian government remain vulnerable or civilian government make alliance with military and allow indirect military rule.

### 2. Judicial Activism and Selectivism

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 (Jones, 2001). It is the exercise of disapproving policies of the government officials not clearly proscribed by the Constitution (Kmiec, 2004). Judicial activism is also considered as a neologism of judicial review and referred

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to the superior courts' authority to check constitutionality of a law and of an administrative action (Shabbir, 2013).

In Pakistan, the concept of judicial activism got impetus after mini revolution of the restoration of the *de jure* judiciary in 2009. Thereafter, judiciary started its functioning more effectively that consequently created debates in legal fraternity, which 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 activism is inevitable for the trichotomy of powers, consolidation of democracy, reinforcement of the democratic institutions, and constitutionalism. The following segment examines test of judicial activism, whether judicial activism creates impediments to civilian governments and narrows down functional sphere of the executive or it is a tool to keep democracy on the track of evolution, and 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 (Article 8 to 28), protected by the Constitution (Article 184(3) of the Constitution of Pakistan, 1973). '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 Superior 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, to public at large, or to a community as a whole (*Pakistan Muslim League v Federation of Pakistan*, 2007). 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.

In a case (*Miss Benazir Bhutto v Federation of Pakistan*, 1988) the petitioner invoked 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 to the Constitution (Eighth Amendment Act, 1985). 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 (Menski, Alam & Raza, 2000).

Likewise, in a case (*Darshan Masih v the State*, 1990) 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 (Article 9, 11, 14, 15, 18, and 25 of the Constitution of Pakistan, 1973). 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 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 (*Human Rights Case No. 1*, 1992) 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 another case (*Ms. Shehla Zia and others v WAPDA*, 1996) 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 (*H.R.C. No. 965*, 2005), 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) (Shabbir, 2013).

After the mini revolution of 2009, which turned out to be restoration of the judiciary including the reinstatement of the then Chief Justice, *Iftikhar Muhammad Chaudhry*, Judicial Review transformed into to 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 (Shabbir, 2013).

In the evolution of judicial activism in Pakistan, judiciary not only successfully isolated itself from military influence by 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 a case (*Dr. Mobashir Hassan v the Federation of Pakistan*, 2010), 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 military regimes. The same Article also incorporated provision prohibiting the Superior Judiciary from validating every kind of military intervention, which could amount to high treason (Article 6 (2A) of the Constitution of Pakistan, 1973). 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* (*Suo Motu Case No. 4*, 2010). The Court prosecuted the Prime Minister for non-compliance to the Supreme Court's directions in the NRO case (*Dr. Mobashir Hassan v Federation of Pakistan*, 2010).

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 (*Ahmad Tariq Rahim v Federation of Pakistan*, 1992). In one case, the Court refused non-restoration of the ousted government (*Federation of Pakistan v Saifullah Khan*, 1989). While in the other case, the Court reinstated *Sharif's* government (*Nawaz Sharif v President of Pakistan*, 1993). 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 and considered it as selective adjudication with biased approach.

In a case (*Human Rights Case No.19*, 1996), the petitioner's case was registered under Article 184 (3) on the receipt of a letter to the Chief Justice regarding 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 *Mehran 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 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 1990s elections were rigged.

In a case (*Suo motu Case No. 5*, 2012), 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.

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 340 Million 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. In current democratic transition, the Court 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 (Waseem, 2012). 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.

### 3. 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 (Bali, 2011; Pollack, et al, 2011). 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 (Kalhan, 2013). 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 Justice. 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 (Fair, 2009).

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 (Kalhan, 2013). 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 (Kalhan, 2010). The coexistence of both constitutional and extraconstitutional orders, which was essentially an issue of political nature, was very challenging task.

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 (Siddiqi, 2008; Wasim & Abbasi, 2008). In fact, both sides of the government were least concerned and sincere in their efforts regarding judges' restoration, particularly *Iftikhar Chaudhry* as Chief Justice (Kalhan, 2010). 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 (*PML (N) v Federation of Pakistan*, 2007). 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.

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 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 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 letter's influence but was also aware of military's entrenched powers after the elections. 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 in order to prevent his impeachment (Kalhan, 2013). 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 status of judiciary as inherited from *Musharraf's* regime: vulnerable and dependant (Saddiqi, 2008). 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 (Asghar, 2008).

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. 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 (Khan, 2005).

Despite the fact that this strategy of amendment to the constitution appeared to have narrowed down 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 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 *Sharifs* 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 (Kalhan, 2013).

#### **4. 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 constitutionalism, but also an ultimate arbiter for deciding political controversies (Hirschl, 2006). 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 (Kennedy, 2012). In its earlier two decisions, the Court while validating *Sharifs* 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 *Sharifs* from holding elected office (*Federation of Pakistan v Muhammad Nawaz Sharif*, 2009). Going further, in July 2009, the Court vacated *Sharif's* conviction of 2000 for hijacking *Musharraf's* commercial flight (Rashid, A. 2009). 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 (*Federation of Pakistan v Muhammad Nawaz Sharif*, 2009).

In another landmark case (*Sindh High Court Bar Association v Federation of Pakistan*, 2009), the Court invalidated *Musharraf's* legacy of proclamation of emergency, the PCO, Constitutional Amendments, other laws, and *Musharraf's* actions were declared unconstitutional and *ab initio* void. 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. 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. 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 contended its own independence from the representative government, and formally asserted its role as an arbiter for deciding political controversies (Remus, 2012). 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 (*Sindh High Court Bar Association v Federation of Pakistan*, 2009).

The Court 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. 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.

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 individuals, which was meant to facilitate each other (*Dr. Mobashir Hassan v the Federation of Pakistan*, 2010). 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 (Article 62 & 63 of the Constitution of Pakistan, 1973). 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. 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 (Shambayati, 2008). Generally speaking, Judiciary and Military may share common standards and assumption about politics. 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 (Kalhan, 2013).

In another case (*Muhammad Nasir Mahmood v Federation of Pakistan*, 2009), 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. 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.

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 (*Muhammad Rizwan Gill v Nadia Aziz*, 2010; Kennedy, 2012). Once again, the Court strengthened extraconstitutional discourse and expanded military's authority at the cost of the civilian institutions (Kalhan, 2013). These cases explicated how judiciary secured itself autonomy both from military regimes and civilian supremacy.

## 5. Conclusion

To conclude with, judiciary significantly contributed in formation of constitutional history of Pakistan. In democratic transition, military's role remained as an unavoidable additional stakeholder due to strategic importance, external, and internal challenges being faced by Pakistan. Despite the fact that despotic regimes and extraconstitutional acts have been legalized by judiciary, but with post *Musharraf* regime judiciary exceptionally responded and secure its autonomy both from military and civilian governments. This judicial activism has been appreciated as well as criticized by scholars, which this article examined in length. In light of above arguments, this research article explicated how judiciary asserted autonomy from military regimes as well as from civilian government. For instance, in 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 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, which the Court turned down on the assumption of its autonomy.

These isolated institutional efforts leading to another avenue of confrontation between government and judiciary wherein judiciary could replace itself with military despotic authority or government could make an alliance with military and thereby allow indirect military rule. Any of these possibilities could push back the country to pre-2009 situation, which could be more deteriorated and least favorable for democratic consolidation and constitutionalism in Pakistan. Both judiciary and government should extend their institutional efforts to roll back extraconstitutional actions, none of the state organs should idealize absolutism, and should allow modest control towards each other considering the spirit of separation of powers and system of checks and balances.

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