



## Analysis of the Independence of the Judiciary in Pakistan (2007-2025)

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### Abstract

Independence of judiciary is vital for a healthy democratic system. This research study explores the key challenges faced by judiciary from 2007 to 2020. The study also analyzes the effects of judicial activism on the independence of the judiciary. Data is collected through primary and secondary sources. Interviews were conducted with experts, politicians, judges, lawyers and analysts. Thematic analysis techniques have been used to analyze the data. This research study thoroughly analyzed various developments i.e., from Lawyers' movement to 26<sup>th</sup> constitutional amendment. The research study found that lawyers' movement was a landmark achievement for the independence of judiciary but later on judiciary played an activist role. The judiciary interfered in the domain of the legislature and the executive that badly hampered the cause of the independence of the judiciary. This study suggests that judiciary should perform a balance role which is necessary for a healthy democratic polity.

**Keywords:** Parliamentary Democracy, Judicial Activism, Pakistan, Supreme Court, High Court, Judiciary, Separation of Power, Independence of Judiciary, Rule of Law, Suo Motu.

### Introduction

There are three branches of a government: legislative, executive, and judiciary. Among these, the judiciary is often regarded as the most important. Its primary duty is to protect the Constitution and ensure the safeguarding of citizens' fundamental rights. The role of the judiciary is considered indispensable for a healthy democratic society and state. As an independent branch of government, the judiciary is vital to the effective functioning of any democratic system (Rahman, 2023). According to Hussain (2015) the judiciary of Pakistan has a chequered history. It mostly played a subordinate role to the executive branch until 2007. However, after the restoration of judges in 2009, the judiciary's role was criticized for intervening in the affairs of the other two organs of government. He notes that political history illustrates a complex interaction between the executive and the judiciary. A comprehensive overview of more than half century of the country's judicial history is necessary to apprehend this relationship (Hussain, 2015). According to Rahman (2023) Pakistani judiciary has its roots in British India and was established in areas not included in the newly established country. Despite this, it is closely linked to the judicial system established for all of India and follows its traditions and institutions (Rahman, 2023). According to Khan (2016) the judiciary was one of the foremost institutions established by the colonial masters in the subcontinent. Khan notes that judiciary became the proud legacy of the colonial masters who could

arguably boast, with some justifications, that it was mainly the judiciary that introduced the rule of law in the state. He stated that the judiciary was an essential organ of the government for enforcing law and order in a country. The country had already suffered and faced anarchy and chaos for almost a century and a half on account of the decay of the Mughal Empire (Khan, 2016). After independence, the newly established state inherited a judicial system with a high level of competence and reputation (Cohen, 2006). The main reason was that the appointment procedure of judges was purely based on merit. Mian Abdur Rashid, the first CJ of Pakistan, was a man of unimpeachable reputation and character (Badshah, 2021). He shunned appearances in public gatherings and functions. Muhammad Munir, his successor, was highly controversial because of his judgments. However, his later successors, namely Shahabuddin and A.R. Cornelius, maintained high standards of judicial conduct. During the British period, great care was given to appoint judges of higher courts. Judges were either appointed through the Indian Civil Service or among the prominent lawyers of the time (Khan, 2016). The judges who served in the High Courts of British India were famous for competence and integrity, with a few exceptions (Rahman, 2023).

### **Research Questions**

What key challenges and developments that affected independence of judiciary in Pakistan from 2007 to 2025?

### **Research Objectives**

To examine the key challenges evolution of independence of judiciary in Pakistan from 2007 to 2025.

### **Research Methodology**

This study employs a qualitative research approach. Accordingly, a subjectivist-interpretive worldview has been selected for this study, rather than the pragmatist and objectivist paradigm. It is worth noting that objectivist and pragmatist approaches are typically used in experimental and empirical studies (Howell, 2012). Further, independence of judiciary in Pakistan from 2007 to 2020, have been seen in social constructivist-context (Hindness, 1997)

### **Research Type**

This research study is qualitative and interpretive. Qualitative research explains persons, events and so forth scientifically and does not require numerical data. Again, qualitative stands on in-depth analysis based on interviews (Berge & Bruce, 2004). The study is qualitative as it does not focus on numerical statistics. Further, this research work is exploratory and analytical in reasoning. Exploratory-analytical is a research that focuses on the interconnection between different variable and their impacts on one another.

### **Data Analysis and Discussion**

This section of the research study thoroughly discusses the secondary and primary data related to the independence of judiciary.

### **Protecting the Judiciary: Constitutional Safeguards**

According to Taj et al, (2016) in the oscillation of regime shifts between the military and the civilian government, the later remain often weak. They believe that same has happened even under the direct rule of the elected democratic government of Pakistan (Taj et al., 2016). Those who oppose judicial activism argue that, in the prevailing circumstances, the media and judiciary are

the leading challenges to the smooth democracy of the country (Badshah, 2021). This section of the research study analyzes how the judiciary has succeeded in gaining independence from civilian and the country's military establishment. Judiciary has subsequently influenced the post-Musharraf democratic era. In this chapter, the struggle for the survival of democratic institutions has also been analyzed. The PPP led government established in 2008 was committed to reverse the extra-constitutional measures of the previous governments. Similarly, the government was trying to protect the parliament from possible aggression. Meanwhile, the parliament passed the 18th amendment unanimously, thus preventing the judiciary from validating the extra-constitutional actions and future military coups (Shamshad, Sarwar & Arshad, 2022). Furthermore, the 18<sup>th</sup> Amendment provides a definite procedure for the appointment of judges in the Supreme Court, High Courts and Federal Sharia Court. As a result, the process used to appoint judges to the judiciary has been institutionalized (Rabbani, 2011).

### **Pre-18<sup>th</sup> Amendment Judicial Appointment Process**

The procedure for appointing judges was different before the 18<sup>th</sup> Amendment. The President exercised the nominal power to appoint judges based on the recommendations of the CJ of Pakistan (Munir et al., 2021). Similarly, in the appointment of High Courts judges, the governor had the appointing authority, but subject to the recommendations of the CJ of concerned High Court, who had to channelize through the Chief Justice of the Supreme Court. Finally, appointment was made by the President (Hussain, 2011). In the previous practice of appointing of judges, the Chief Justice of the province and the CJ of the Supreme Court had vast powers and played a vital role prior to the enactment of 18<sup>th</sup> Amendment in the Constitution of Pakistan. However, the Supreme Court curtailed the executive authority of the President in the *Al-Jihad Trust v. Federation of Pakistan*, 1996). In this case, the apex court declared that the President of Pakistan is bound to act upon the recommendations put forward by the Chief Justice. However, if the President of Pakistan departed from the recommendations put forward by the CJ, the same should be followed by justiciable reasons (Ijaz, 2014

### **Streamlined Judicial Appointments: The Post-18<sup>th</sup> Amendment Framework**

Article 175-A of the 1973 Constitution of Pakistan stipulates the appointment of judges within the judiciary. Article 175-A, as amended by the 18th amendment, stipulates the establishment of a judicial commission responsible for the appointment of judges to the Supreme Court, High Court, and Federal Shariat Court (Rabbani, 2011).

Article 175-A now delineates the comprehensive procedure for the appointment of judges to the highest courts and shall comprise the following members

- (a) Chairman: The CJP shall serve as the chairman.
- (b) Members: The two most senior justices of the Supreme Court.
- (c) Member: The Chief Justice must nominate and appoint one former Chief Justice or judge for a term of two years, in consultation with the other two most senior justices of the Supreme Court.
- (d) Member: The Minister of Federal Law
- (e) Member: The Attorney General of Pakistan
- (f) Member: A senior advocate appointed by the Pakistan Bar Council for a term of two years (Munir et al., 2021).

Additionally, the President possesses the power to designate the most senior judge of the Supreme Court as the Chief Justice of Pakistan, as enshrined in Article 175-A of the constitution. The Judicial Commission shall establish the procedural conduct for the Judicial Council (Rabbani, 2011).

The commission for appointing of judges in the High Courts shall consist of

- a) The CJ of the concerned High Court
- b) A senior most judge of the concerned High Court
- c) The law minister (provincial)
- d) One member must be nominated by the Bar Council for a period of Two-Years.

The parliament adapted the court's recommendations and revised the constitutional provisions of the 18<sup>th</sup> amendment related to the appointment of judges by enacting the 19th Amendment. TheSC, in *Munir Hussain Bhatti v. Federation of Pakistan*, asserted that the appropriate forum for evaluating a judge's competence is the commission (PLD 407 SC 2011).

Before the promulgation of the 18<sup>th</sup> and 19<sup>th</sup> Amendments, the CJP had disproportionate authority over the appointment of judges. However, this discretionary power has been barely exercised by the Chief Justice on account of the frequent regime changes and political dynamics in the country (Naz et al., 2021). Further, after the restoration of judges in March 2009, its role has been unprecedented, and a number of actions have been taken by the judiciary. Consequently, the role of the CJP has been transformed from merely the theoretical head of the judiciary to an absolute leader (Munir et al., 2021). The Supreme Court, in the case of *Justice Hasnat Ahmed Khan v. Federation of Pakistan*, while deciding over the legality of the PCO, removed more than a hundred judges (PLD 680 SC, 2011). According to Article 209 of the Constitution of 1973, a constitutional mechanism exists to file a reference in the Supreme Judicial Council for the removal of judges (Constitution of Pakistan, 1973). The decision of the Supreme Court to remove the judges without following the specified procedure in accordance with the provisions of the Constitution has itself defunct the role of the Supreme Judicial Council to hold the judges accountable. After the restoration of judges, the government strived to adopt a modest control over appointing judges. However, the court reversed all its efforts and actions regarding the appointment of judges and re-empowered the Chief Justice in the appointment procedure of judges (Ali, 2021).

The critics of judicial activism have highlighted two adverse impacts: Firstly, the court's negation to accept the role of parliament regarding the basic idea of the 18<sup>th</sup> Amendment, thus weakening the already fragile representative institutions and the consolidation of democracy. Secondly, the institutional approach to decision-making has been compromised as it shifts from an institution to an individual (Ijaz, 2014). Critics contend that following the reinstatement of judges, the nation is seeing the phenomena of judicialization of politics, wherein the court employs legislation to achieve political objectives (Cheema, 2016). Likewise, politicians emphasize the legal imagination of vying for power. This period, commencing with the enactment of the 18th Amendment and advancing through court recommendations and directives, illustrates the institutional autonomy in exercising veto power on judicial appointments. The primary motive was to protect the judges from external scrutiny during the initial appointment phase and to ensure immunity from accountability thereafter. The judiciary exhibited a tendency for selective adjudication, as the court adopted a political approach in resolving specific cases while neglecting others (Waseem, 2012).

Additionally, the judiciary's institutional reforms have been adversely affected by the court's oversight authority to monitor the executive's performance, which has not only weakened the fragile democratic system but also undermined it. The excessive exercise of the suo motu power and the public interest litigation have been increased in the apex court. Similarly, removing judges by a single verdict and deviation from accountability had adversely affected the consolidation of democracy in the country (Gazdar, 2009)).

The judiciary has safeguarded and acquired veto power over the parliamentary committee, although they have not prioritized addressing the formalities and deficiencies in the administration of justice. As a result, the evolution of judicial activism has been limited due to its retroactive rather than prospective orientation. The judiciary was preoccupied with combating the former dictator, Musharraf, and neglected to concentrate on future matters (Muhammad, 2012). The Supreme Court deemed the NRO illegal, submitted the 18th Amendment to Parliament for reconsideration over their recommendations, and asserted that the committee's involvement in judicial appointments effectively nullified the 18th Amendment. As a result, it has further complicated the efficient functioning of the state organs. Furthermore, the CJP dismissed the judges who had sworn oaths under PCO-II. Nonetheless, he had sworn an oath under the PCO and legitimized Musharraf's takeover via the "Doctrine of Necessity." Additionally, he affirmed the referendum and the Legal Framework Order of 2002, and notably, the retention of two positions by the then President of Pakistan in 2005 (Jan, 2022).

### **Independence of Judiciary under Article 175-A**

Article 175, as inserted in the constitution, does not affect the independence of the judiciary. This article provides a new mechanism for the appointment of judges in the superior courts. The primary motive of the parliament behind this article was to ensure the autonomy of the three organs of the government (Munir et al., 2021). The new procedure introduced through Article 175-A declares a candidate eligible for appointment from dependence of the judiciary and the executive. In addition, it has made the process of nomination, rejection, and scope of consultation more transparent (Khosa, 2023).

Article 175-A has indeed ensured the independence of the judiciary, as the majority of the members of the Judicial Commission are from the judiciary. Consequently, the executive has been prevented from playing a vital role in appointing judges as they do not have veto power over the Judicial Commission (Ali, 2021). The Supreme Court ruling in the Al-Jehad Trust case (PLD 323 SC 1996) declared that the appointment of judges is the executive and administrative function of the judiciary. Hence, the Supreme Court upheld the independence of the judiciary and asserts that the executive should not interfere in the appointment of judges. The CJ of the Supreme Court and the CJ of the High Court perform executive and judicial functions. The executive function includes the appointment of judges, approval of the budget, and the constitution of benches for hearing cases. At the same time, its judicial functions are performed under Articles 183, 184, 185, 186, and 199 of the Constitution (Constitution of Pakistan, 1973). The independence of the judiciary primarily depends on two primary factors: the jurisdiction of judges and their security of service. Articles 183, 184, 185, 186, and 199 deal with the jurisdiction of the apex court; in these articles, no changes have been made. The security of service and tenure are, essential components that allow judges to perform their services independently and have been consolidated. Moreover, the arbitrary power of the executive has been revised by making changes in Articles, 200 and 203-C (Rabbani, 2016)

### **Appointment Procedure of Judges: The Post 26<sup>th</sup> Amendment Scenario**

The Parliament has passed 23 constitutional amendments since the enforcement of the Constitution of 1973. Formally the total number of amendments as counted as 26. Three amendments (the Ninth, 11<sup>th</sup> and 15<sup>th</sup>), were introduced in the parliament but never passed. Further, out of these 26, 13 amendments are entirely or partly related to the judiciary. Eight amendments are almost solely related to the judiciary. The remaining five cover various subjects including the judiciary. In contrast, the parliament of India has passed 106 amendments so far and only eleven amendments are related to judiciary. The majority of these amendments have been viewed in the context of a power tussle between the executive and the judiciary. There is a parliamentary form of government, wherein the majority of the members of the executive are taken from the parliament. However, the parliamentary committees, do not exercise an effective oversight over the executive. In most cases, the members of the standing committees meet the expectations of the ruling party or parties. As a result, the only institution that can check the actions of the executive and the parliament independently is the judiciary, particularly, the SC and the High Courts. Consequently, majority of governments are keen to find a way to blunt the judicial weapon of accountability. Hence, it is the primary reason behind such a large number of amendments related to the judiciary. To be honest, the judiciary has not always been on the receiving end; there have been instances where the judiciary appears to ‘encroach’ on the turfs of the parliament and the executive. Asif Saeed Khosa, a former CJP, frequently called for a grand dialogue, to prevent the judiciary, parliament, executive branch, military, and intelligence services from intruding on each other’s domain.

### **Judicial Commission of Pakistan**

The Judicial Commission has been re-constituted after the enactment of the 26<sup>th</sup> Amendment in the Constitution. The Judicial Commission has 13 members. The details of the members are under

- (a) CJP Yahya Afridi will serve as the chairman of the commission.
- (b) Justice Mansoor Ali Shah, Justice Munib Akhtar, and Justice Amin-Ud-Din
- (c) Justice Amin-Ud-Din, seniormost judge of the Constitutional Bench.
- (d) Azam Nazeer Tarrar, Federal Minister for Law
- (e) Mansoor Usman Awaan, Attorney General for Pakistan
- (f) Sheikh Aftab Ahmad from the government benches, Umar Ayub (Opposition), members from National Assembly.
- (g) Farooq H. Naek (Government) and Syed Shibli Faraz (Opposition), members from the Senate of Pakistan
- (h) Akhtar Hussain, Nominated by the Pakistan Bar Council.
- (i) Roshan Khursheed Barocha, Women or Non-Muslim nominated by Speaker of National Assembly (DAWN, 2024).

### **Parliamentary Committee**

The 26<sup>th</sup> Amendment provides for a special Parliamentary Committee consisting of Twelve members. Eight members will be selected from the National Assembly on based on proportional representation. Further, four members will be from government benches and four members from opposition benches. Similarly, four members will be selected from the Senate of Pakistan, wherein, equal weightage is given to treasury and opposition benches (Tribune, 2024). The special Parliamentary Committee notified by the Speaker of the National Assembly, under clause (3B) of Article 175A consists of the following members

- (1) Khawaja Muhammad Asif (MNA)
- (2) Mr. Ihsan Iqbal (MNA)
- (3) Ms. Shaista Pervaiz Malik (MNA)
- (4) Raja Pervez Ashraf (MNA)
- (5) Syed Naveed Qamar (MNA)
- (6) Ms. Rana Ansar (MNA)
- (7) Mr. Gohar Ali Khan (MNA)
- (8) Sahibzada Muhammad Hamid Raza (MNA)
- (9) Senator Farooq Hamid Naek
- (10) Senator Azam Nazeer Tarar
- (11) Senator Syed Ali Zafar
- (12) Senator Kamran Murtaza (National Assembly Secretariat, 21<sup>st</sup> October, 2024)

### **Appointment of the Chief Justice of Pakistan under the 26<sup>th</sup> Amendment**

The 12-member Parliamentary Committee will recommend one name from amongst the three senior panels, by a two-thirds majority, for appointment of CJP, to the Prime Minister. The Prime Minister, will recommend the name to the President for appointment as Chief Justice of Pakistan. The term of office of the CJP has been fixed as three years in the 26<sup>th</sup> Amendment. In case, the appointed CJP refuses, then the next senior most judge will be considered (Tribune, 2024). The PC selected Justice Yahya Afridi by more than a two-thirds majority (9 out of 12 members), from the three senior-most judges including Justice Mansoor Ali Shah, Justice Munib Akhtar and Justice Yahya Afridi. The remaining three members of PTI boycotted the proceedings of the PC and did not participate in the meeting (Nation, 2024). The name was recommended to the PM, who sent the name to the President for appointment. Consequently, the President appointed Justice Yahya Afridi as the new CJP for three years (DAWN, 2024).

### **Appointment of Judges in the Supreme Court and High Courts**

The judges of the SC and High Courts will be appointed by the Judicial Commission of Pakistan by a simple majority. The JC comprises of 13-members.

### **Constitutional Bench**

The Judicial Commission of Pakistan constituted a seven-members constitutional bench for hearing cases of a constitutional nature. The bench consists of; Justice Amin-Ud-Din Khan and Ayesha Malik from Punjab, Justice Syed Hassan Azhar Rizvi and Justice Muhammad Ali Mazhar from Sindh, Justice Jamal Khan Mandokhail and Justice Naeem Akhtar Afghan from Baluchistan and Justice Musarrat Hilali from Khyber Pakhtunkhwa. Justice Amin-Udd-Din being the senior-most judge will be the head of the committee for the formation of constitutional benches for cases related to constitutional matters (Business Recorder, 2024, para. A). The other two members of this committee as Justice Jamal Khan Mandokhail and Justice Muhammad Ali Mazhar. Further, after the enactment of the 26<sup>th</sup> Amendment and the new law passed by the parliament Justice Amin-Ud-Din Khan will also be a member of the SC, Practice and Procedure Committee (Tribune, 2024).

### **Balancing and rebalancing judicial autonomy**

Following the successful overthrow of Musharraf's extraconstitutional measures in 2009 and the restoration of judges to office, judicial activism and autonomy evolved into a new competition over judicial independence from the legislature. As a result, this conflict heated up even further, raising fears that the military was involved in an effort to topple the nation's precarious democratic system (Kalhan, 2013). These conflicts have serious ramifications for institutional disequilibrium,

which would negatively affect the nation's democratic transition. However, institutional equilibrium would eventually result from the state institutions authenticating their jurisdictional circles, therefore this institutional disequilibrium is not a permanent issue. This would lead to the consolidation of democracy in the country (Munir, 2020).

### **Supreme Court viewpoint on Judicial Autonomy**

The judiciary's reaction was fervent following the conclusion of arguments in the 18th Amendment cases. To apply the basic structural theory and associate the change with the judiciary's independence. Justice Ramday has said that the judiciary in the country is undergoing an evolution that considers the basic structure doctrine (Iqbal, 2010). The judiciary has directly challenged the unlimited power of parliament to amend or alter the Constitution. The legislature possesses the authority to amend the constitution; nevertheless, the CJP questioned the legitimacy of Article 239, enacted during Zia's regime. The court noted that Parliament does not possess unrestricted power concerning constitutional amendments. It was anticipated that the judiciary would take into account a specific explanation of the theory. to use the authority of judicial review and the severability principle to declare the provisions of 18th Amendment's pertaining to the appointment of judges unconstitutional (Almeida, 2010). Even if it is acknowledged that judicial autonomy complements the basic structural concept, the judiciary hardly ever offers any guidelines for what exactly constitutes judicial independence, stating that it either pertains solely to the appointment process or something else entirely. Kramer (2002) Furthermore, the Supreme Court unequivocally stated that judicial independence is a fundamental and constitutional imperative following the restoration of judges. In the PCO judge's case, the Supreme Court declares the law that raised the number of judges unconstitutional on the grounds that it violates the judiciary's independence (Sindh High Court Bar Association V. Federation of Pakistan, 2009). The court ruled that the president does not have the authority to suspend or dismiss judges. Furthermore, the judiciary's independence is a crucial constitutional element that guarantees judges' tenure and security of office (Iftikhar Muhammad Chaudhry v. President of Pakistan, 2010).

The apex court also declared that the withdrawal of criminal cases without the will and consent of the judiciary is a clear transgression of judicial independence. The Supreme Court, in the NRO case, declared that the transfer of authority to a non-judicial entity for the withdrawal of criminal cases without prior approval of the court is usurpation and infringement upon judicial independence (Mubashir Hussain v. Federation of Pakistan, 2010). While hearing arguments in the 18<sup>th</sup> Amendment case, the judges criticized the provisions regarding the appointment of judges and despised Parliament. Nonetheless, the adoption of the 18<sup>th</sup> Amendment by the parliament is considered a remarkable achievement in the constitutional and political history of the country. The apex court criticized the parliament for not having a thorough deliberation and debate on the provisions of the amendment related to the appointment of judges before it was unanimously passed by the parliament (Khan, 2010). The court criticized Parliament for failing to consider the trust of the Bar Association and lawyers, who were the petitioners and relevant stakeholders (Khan, 2010). Furthermore, the supreme court questioned the legitimacy of Parliament, noting that this amendment did not represent the will of the populace. Furthermore, the court questioned the committee's formation, asserting that it lacked democratic legitimacy since its members were not directly elected by the populace but were instead appointed by the parliament. The court reaffirmed that judicial independence is a fundamental aspect of the constitution. Therefore, it cannot be compromised (Nadeem Ahmad v. Federation of Pakistan, 2010). The Supreme Court's reservation and recommendation led to the 18th Amendment's return to the legislature for a reexamination of

its provisions related to the appointment of judges (Ali, 2021). The court declared that both Parliament and the Judiciary are not rivals. Instead, they are indispensable and complementary for the smooth functioning of a political system. In addition, the court observed that to have peace in society and to ensure the rule of law, institutional clashes must be avoided. It seems the decision of the court embodied restraint and avoided direct determination and acceptance of the basic structure doctrine; it instead contemplated a parliamentary discourse (Robert, 2010).

### **Trichotomy of Power and Constitutional Disequilibrium**

The state authority has been divided into three organs for the purpose of regulating the affairs of the state. The three organs are entrusted to perform their functions as enshrined in the Constitution. Further, there is a system of checks and balances to have a control mechanism of checks and balance system So that one organ can check the actions of the other organ of the government. However, in some of the developing countries such norms and practices are not completely established and hence lead to worry of rivalry as well as disequilibrium among the organs of the state. Unlike the developing countries, our country has faltered between democracy and authoritarian regimes (siddiq, 2016). The important role of the judiciary is considered vital for the successful transition of democracy in the country. Moreover, the interference and involvement of the judiciary in political affairs are not a healthy sign for the strengthening of democracy in the country. Further, it is not considered a remedy for all the problems attached to democratic transition (Ahmad, 2021). This segment of the research analyzes how frequent judicial activism badly affects the political and constitutional development of the country. After a successful struggle, democracy was restored in the country, and incidents between the judiciary and parliament have increased to an alarming extent. The same got famous when a regime was invalidated, which raised the concept of judicial independence from the parliament in a mode that weakens constitutionalism and democracy in the country.

### **Supreme Court; “A Catalyst of Military’s Regime”**

The recent shift of Pakistan towards democracy provides opportunities for long-lasting constitutionalism and democratic governance. However, there is a need to strike a balanced approach and reasonable compromise between judicial autonomy and its limitations, taking into account the judiciary’s role in the entire transition process. In addition, it is crucial for the parliament to strengthen its governance capabilities to establish a mechanism that guarantees the independence and accountability of the judiciary in order to strengthen its role. Ongoing constitutional reform facilitates the transition from an authoritarian administration to a democratic society grounded in the rule of law and constitutionalism (Anil, 2013). In 2007, the judiciary asserted unprecedented independence from the regime during the lawyer’s movement when Parvaiz Musharraf removed Chief Justice Iftikhar Mohammad Choudhry. This was a historic movement launched by lawyers and supported by political parties and civil society. It is considered a landmark development in Pakistan’s constitutional and political history. Its primary objective was to restore democracy and ensure constitutionalism in the country. However, with the restoration of democracy in the country in 2008, consequential conflicts and tussles among the Parliament, Judiciary and Military raised concerns. The general public broadly celebrated the judiciary after challenging Musharaf’s regime. However, it is observed that they are undermining the civilian government while invoking the notion of independence of the judiciary. Further, to adopt an adequate approach to judicial impartiality in normative and descriptive contexts, a deeper contextualized approach is required to describe its impartiality in contrast to its typically invoked

principles (Stephen, 1998). Judicial impartiality does not entail maximum autonomy, nor is it an end in itself; however, it arises from their relationship and interdependencies (Peter, 2009).

Khan argues that

*“judiciary has gained autonomy and independence rather it gained over autonomy in the period of 2007 to 2020.”*

Several factors have contributed to the independence of the judiciary. The successful Lawyer’s movement against Pervez Musharraf was a driving force which led to the restoration of judges in 2009. Similarly, the decision of Justice Waqar Saith against the former dictator Pervez Musharraf is also considered a landmark judgment in the judicial history of Pakistan. There are a number of leading cases including the disqualification of Prime Minister Yousuf Raza Gillani, the disqualification of Prime Minister Mian Mohammad Nawaz Sharif, the steel Mill case, and suo motu notices that have enhanced the independence of the judiciary. He argues that these cases have ensured the autonomy and independence of judiciary on the one hand while on the other hand it seems that the judiciary is over-ambitious and activist which is harmful to the smooth functioning of democratic institutions in the country. He pointed that

*“judiciary’s intervention in the domain of the executive and legislature have turned independent judiciary into a populist and activist judiciary.”*

Consequently, the judiciary in Pakistan from 2007 to 2020 has occupied the role of a populist, activist and over-ambitious judiciary on account of the various leading cases and suo motu notices. He further states that another factor responsible for the independence and populist judiciary of Pakistan is that judiciary in other countries i.e. India, Turkey and even in the USA had exercised more autonomy as a result of the populist wave. This has also resulted in the independence and autonomy of the judiciary in Pakistan. Moreover, the judicial history is another factor that has resulted in the independence of judiciary. He divides the history of the judiciary into two major phases. The first phase is from 1947 to 2007, and the second phase is from 2007 to 2020. He states that in the first phase, judiciary was politicized while in the second phase, politics has been judicialized. This is evident from the Reko Diq Case, the disqualification of the two elected Prime Ministers and the case of Independent power plants. He has summarized that three important factors are responsible for independence and autonomy rather over ambitious judiciary which includes, firstly, the Lawyer’s movement, Secondly, the international wave and lastly, their politicized history (Khan, personal communication, March 23, 2023).

Nawaz argues that the judiciary is an important organ of the government, hence independence of the judiciary is vital for the consolidation of democracy. He explains that

*“the judiciary has played the role of “B team” of the powerful circles of the country.”*

The judiciary plays an active role when it faces a challenge from these circles. He states that Iftikhar Choudhry took oath as PCO judge and thus legitimized the illegal takeover by Pervez Musharraf. Later on, he became Chief Justice, and things went on smoothly. However, when the difference of opinion was observed and he challenged various actions of Pervez Musharraf, he was removed from his position. He started a movement for the restoration of the judiciary and was re-instated by the PPP-led government in 2009. After his restoration as CJ, he took several suo motu notices and various actions. He states that the independence of the judiciary is facing various

problems and challenges. Firstly, judges are appointed from amongst the lawyers, in the High Courts and later on elevated to the Supreme Court. These lawyers are often affiliated with one or another party and when they are appointed as judges of the High Court, their political affiliation influences their career hence no one cannot expect that they will dispense justice impartially and fairly. He further states that the judges of the lower courts have proper training after their recruitment but their ratio of elevation as judges in the High Courts is low. There is no such proper training for lawyers after they are appointed judges in the High Court. Finally, there is the problem of insecurity, as judges fear insecurity of their job and also fear that violent mobs should not react against them. He states that

*“Iftikhar Choudhry introduced “Popular Justice, which means decisions which affect people and gain appreciation from the majority of people”*

The Popular Justice” also badly affected the concept of the independence of the judiciary. The judiciary intervened time and again in the affairs of the executive i.e. reducing and fixing prices of items is not the job of a judge. He states that it is advisable to follow the concept of judicial restraint rather than playing an activist role. He concludes, that questions are raised on the independence of the judiciary and it will be raised in the future as well. There are various cases where the judiciary has played a discriminatory role including the Panama Case, the disqualification of Yousuf Raza Gilani and even in bench’s formation (Nawaz, telephone interview, January 5, 2023).

According to Shehzad,

*“independence of the judiciary in Pakistan has remained a hoax, from Mulvi Tamizudin case to the Panama, it has always remained polarized, divided and misled”*

According to him, we have witnessed the repeated invocation of Article 184 (3), by the CJ of the Supreme Court from 2007 to 2020 to the tune of numbers that we have not seen before. No one in the history of judicial activism would have ever witnessed that many Suo Motu notices that too mostly on pity matters or for reasons best known to them. Ironically, the judiciary has not asserted itself, probably it has to do with the processes of elevation of judges to the judiciary (Shehzad, phone interview, February 10, 2023).

According to Yaar, the judiciary in Pakistan is still under the influence of establishment. He further argues that the judiciary is not fully independent and its decisions are influenced by the military establishment (Yaar, telephone interview, April 2, 2023).

According to Khalil, as for the independence of judiciary from 2007 to 2020 is concerned, there are two aspects. One aspect related to the appointment of judges is specified in the constitution through 18<sup>th</sup> and 19<sup>th</sup> amendment that is through judicial commission and parliamentary committee. However, if one critically analyzes the statistics of the appointment of judges in this era, we have some positive and negative outcomes. The appointment of judges is made transparent and through institutional rather than a single person to solely appoint judges. The Judicial Commission includes nine members while the parliamentary committee consists of eight members. On the other hand, critics argue that too much powers are granted in the hands of Chief Justice, who initiates the initial nomination for appointment of judges. Secondly, there are certain judgments of the Supreme Court, whereby the role of the Parliamentary Committee has been minimized as well as the provisions of the Constitution have been violated. As the appointment of

judges is not based on merit, consequently, the independence of the judiciary has been undermined (Khalil, telephone interview, January 20, 2023).

According to Participant 1, the independence of the judiciary has been a contentious issue for several years. The period between 2007 and 2020 is marked by several significant events that affected the judiciary's independence. In 2007, Pervez Musharraf removed Chief Justice Iftikhar Choudhry from his position, sparking widespread protests and a movement for the restoration of the judiciary's independence. After a protracted legal battle, Chief Justice Iftikhar Choudhry was reinstated in 2009, which was seen as a significant victory for the judiciary's independence. He further argues that in 2016, the Panama Papers scandal brought the issue of the judiciary's independence to the forefront again. The Supreme Court of Pakistan took up the case and ultimately disqualified Prime Minister Nawaz Sharif from holding office. This decision was seen as a positive step for the judiciary's independence and demonstrated its ability to hold those in power accountable. However, there were also concerns about the judiciary's independence during this period particularly the use of suo motu powers and the potential for these powers to be misused. He concludes that the independence of the judiciary in Pakistan between 2007 and 2020 was a complex issue, marked by both positive and negative developments (Anonymous Participant 1, Personal Communication, April 11, 2023).

According to Participant 2, the judiciary has also been involved in several cases related to human rights abuses in Pakistan. For example, in 2014, the Supreme Court ordered an investigation into the killing of more than 1,400 people, mostly members of the Hazara community, in Quetta. In 2018, the court ordered the release of several individuals who had been forcibly disappeared. Since 2007, the independent judiciary in Pakistan has played a critical role in upholding the rule of law and ensuring that politicians and other public officials are held accountable for their actions. However, there are concerns about the politicization of the judiciary and the extent to which it is truly independent from political influence (Anonymous Participant 2, Personal Communication, May 5, 2023).

Participant 3, states that the role of the judiciary of Pakistan from 2007 to 2020, has been a subject of debate and controversy. While the court has made significant progress towards asserting its independence and upholding the rule of law. There also have been cases of perceived political interference in its decisions. On one hand, the judiciary has taken several high-profile cases that demonstrated its willingness to take on powerful political figures, including the Panama Papers Case that resulted in the disqualification of former Prime Minister Nawaz Sharif, and the disqualification of several lawmakers who violated election laws in 2013. On the other hand, there have also been accusations of political influence in the judiciary, particularly during the tenure of former Chief Justices, Iftikhar Chaudhry and Saqib Nisar. Some critics argued that the role of both these Chief Justices overstepped their constitutional authority by taking on cases that were beyond the jurisdiction of the court. Similarly, they were influenced by political considerations in their decisions. While the judiciary has marched toward progress in asserting its independence and maintaining the rule of law in Pakistan. This issue remains a contentious one, with differing views on the extent to which the court has been truly independent (Anonymous Participant 3, May 10, 2023).

According to Participant 4, another criticism on the judiciary of Pakistan is that it has been selective in its pursuit of justice. He thinks that Some scholars argue that it has been more aggressive in pursuing cases against political opponents while being more lenient towards allies

of the government. The Pakistani judiciary has also been criticized for the slow pace of justice, with cases often dragging on for years without a decision. Finally, there have been accusations of bias in the judiciary, with some arguing that judges have been swayed by personal or political affiliations in their decisions (Anonymous Participant 4, July 2, 2023).

According to Participant 4, the question of the independence of the judiciary in Pakistan is a hotly debated subject. He believes that scholars have different opinions and perspectives on this topic. He asserts

*“In 2007, there was a judicial crisis in Pakistan that saw the then-President, General Musharraf, dismissed the Chief Justice, Iftikhar Muhammad Chaudhry, and several other judges.”*

This led to widespread protests and a movement for the restoration of the judiciary. The judges were eventually restored in 2009, but debates continued about its independence and impartiality. While there have been some important cases where the judiciary has played an activist role. (Anonymous Participant 4, July 2, 2023).

Participant 5, emphasized that

*“there have been allegations in the past that the judiciary in Pakistan has been influenced by the establishment or other powerful actors, such as the military or intelligence agencies.”*

He depicts that the former judge of the Islamabad High Court Shaukat Aziz Siddiqui publicly expressed the involvement of intelligence agencies in the affairs of the judiciary. These allegations have included claims of interference in the appointment of judges, the manipulation of court decisions, and the use of threats or intimidation against judges. However, it is worth mentioning that there are also a few instances where the judiciary has challenged the role of the military establishment. For instance, the Supreme Court of Pakistan has taken up cases related to the actions of the military and intelligence agencies and has asserted its authority in cases involving political leaders and public officials. He depicts that

*“In December 2019, Waqar Ahmad Seth, who was the Chief Justice of Peshawar High Court, announced death sentence to former President Pervez Musharraf in a high treason case.”*

. Pervez Musharraf was charged with high treason for suspending the constitution and imposing the emergency rule in 2007 when he was the President of Pakistan. The case against him had been ongoing for several years and in 2019, a special court in Pakistan found him guilty of the charges and sentenced him to death. Some people hailed the decision as a victory for the rule of law and democracy in the country. The decision was seen as a positive step towards strengthening democracy in Pakistan, as it demonstrated that no one, not even a former military dictator, is above the law. It was also seen as a victory for the independence of the judiciary, as the judges involved in the case were not influenced by political pressure. Regardless of the debate surrounding the decision, it is clear that the case against Pervez Musharraf and the subsequent decision by Justice Waqar Ahmad Seth has had a significant impact on Pakistan's political system and the role of the judiciary in maintaining the rule of law (Participant 5, Telephone interview, July 22, 2023).

The respondents also pointed out the role of the non-elected institutions and the military's establishment. Further, the independence of the judiciary suffered heavily during the direct military rule. Since 2008, there has been a democratic government and no military takeover has

been witnessed in the country. Consequently, the military's establishment cannot interfere directly in the affairs of the judiciary. However, the respondent asserted the role of the military's establishment as a perceived threat to the cause of the independence of the judiciary.

The respondents agreed that the judiciary was more independent from 2007 to 2020. The respondents argued that up to 2007, the judiciary often played a subservient and controversial role. Various factors responsible for the independence of the judiciary include the lawyer's movement, the restoration of judges and the role of CJP Iftikhar Chaudhry. Some of the respondents opined that the independence of the judiciary turned into a populist and over-ambitious judiciary. strike a rational compromise between the judiciary's impartiality and judicial constraints (Stephen & Friedman, 2002).

## **Conclusion**

Judicial activism has disturbed the notion of balance of power among the branches of government. It has been found that the judiciary on numerous occasions overstepped their constitutional jurisdiction and intervened in the affairs that are considered as the prerogative of the legislature or the executive. Consequently, it weakened checks and balance system, and allowed the judiciary to dominate the other two branches of government.

This research study reveals that judiciary's activist role has not only affected other state's institutions but also damaged the cause of independence of judiciary. The repeated intervention of the judiciary in the affairs of the other two branches of government raised the issue of constitutional jurisdiction between the judiciary and the parliament. As a result, parliamentarians particularly those in ruling party, are calling for a restriction on the judiciary's role, asserting that parliament is supreme and that the judiciary cannot dictate parliament. Consequently, this situation has created significant uncertainty in the country, which could have far reaching consequences for the parliamentary system.

This study suggests that the judiciary should not interfere in the affairs of the legislature and the executive branches of government. Pakistan is a federal parliamentary system that requires that parliament consists of the representatives of the people, therefore, they should be allowed to make laws that serve the population. The concept of parliamentary sovereignty must be upheld in the country, and it is the responsibility of elected representatives to formulate and implement laws that ensure the effective functioning of the federal parliamentary system.

This research study provides a comprehensive discussion of the history of judicial activism in the country. It suggests that, since restoration of judges in 2009, the judiciary increasingly dominated the other two branches of government, which has disrupted the concept balance of power. This study suggests that the judiciary must strictly adhere to its constitutional role and should maintain a balanced approach, as is necessary in a federal polity. This would facilitate the smooth functioning of the federal parliamentary system. Moreover, it would definitely foster an environment wherein the three branches of government can work together more harmoniously, ultimately enabling the political system to achieve its objectives more effectively.

This study further recommends that the judiciary should promote a culture of self-restraint and minimalism. Courts should refrain from unnecessary interference in the functions of the legislature and the executive affairs. To nurture democratic values and culture, the judiciary should strictly

adhere to its constitutional mandate and practice judicial self-restraint. The courts should avoid undue interference in parliamentary decisions and executive actions, except in clear cases of unconstitutionality.

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