

Judicial Activism: Authority or Autocracy? Unravelling The Role of Judiciary in Pakistan

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Abstract

The recent developments in Pakistan, particularly concerning the legislative branch, and the political changes, came into play due to a manifold exchange of historical legacies, socio-economic problems, security crises, Judicial overreach and external interventions, amalgamating an environment conducive to repeated military interventions, constitutional upheavals and disruptions in governance. This exploratory study aims to analyse the constitutional history of Pakistan, with the objective of pinpointing how the Judicial wing via its overreach of extensive powers has been used as a tool to derail democracy and cause hindrance in executive governances in the Nation. This study further contains a focus on exploring alternatives, improving future policies, possible strategies and frameworks to employ which would ensure the formation of a true liberal democratic nation. This work will also feature an analysis on the good governance paradigm, and the concept and possibility of an actual rule of law, and a true concept of separation of powers being feasible in the state. The methodology used for the research is qualitative, using existing literature and data from secondary sources. The research reaffirms the findings from existing research in the context and contributes a unique perspective of a synthesis of literature from constitutional, historical and judicature studies.

Keywords: Good Governance, Judicial Activism, Liberal Democracy, Separation Of Powers, Pakistan, Rule Of Law, Authoritarian Mechanisms

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1. Introduction

Pakistan, a Democratic State, which finds its identity often intertwined with Islamic ideologies, so much so that back in 1973, it changed its name to the Islamic Republic of Pakistan, is in a constitutional upheaval. The state has been completely transformed into what one can call a Kafkaesque State. Historically, the concept of separation of powers seems to be an alien concept to Pakistan, and there have been three centres of power in Pakistan: the military, the judiciary and parliament (Mahmood, 2023). Contrasting most of the democracies around the world, the normal fusion of powers between the three organs; Judiciary, Legislature and the executive seems to be non-existent, and has been substituted in Pakistan by what some often term as the armed forces, the deep state and the establishment, which trump all other pillars of the state. The development of the social contract theory Kersting, W. (2013) demonstrates how the emergence of strong bureaucracies has affected the relationship between the people and the government. According to the traditional theory of the social contract, which was developed by Hobbes, Locke, and Rousseau, the social contract was a mandated agreement between the ruled and the sovereign. The basis of this agreement was the notion that the permission of the governed determined the sovereign's power and that consent also set limits on the sovereign's authority (Fukuyama, 2011). This initial contract framework has been called into question with the growth of permanent, non-people-controlled bureaucracy, such as judicial, military, or civil organisations. The original social

compact is essentially nullified because these bureaucracies maintain power regardless of the will of the people. The population's authority is diminished by this development because these institutions function independently of the general public and the government, frequently with no direct answer to the people.

An illustration of this situation can be found in Pakistan, where the popular mandate has been significantly undermined by the judicial wing. The continuous blame game in Pakistan between the hyper politicisation of the judiciary and the hyper judicialization of politics raises critical questions about accountability while also painting a worrisome image of the situation. Recent events in Pakistan, where issues within the superior judiciary continue to emerge, spurred by internal power struggles and foreign influences, highlight the urgent and vital need for judicial reforms. Pakistan's judiciary has a history of overstepping its authority, frequently under the guise of upholding the constitution and the rule of law. Criticism of the judiciary's activities has resulted in contempt of court charges, creating an environment of impunity.

The Pakistani judiciary has occasionally exercised a great deal of autonomy and influence, which has impacted the governance and power dynamics (Ghias, 2010). The social compact is seen to be eroding as a result of this circumstance, with the will of the people being subordinated to the decisions made by strong, long-lasting bureaucratic institutions. Article 184(3), granting the Supreme Court suo motu powers, has become a double-edged sword. While intended for constitutional review, it has sometimes led to judicial overreach, with judges straying beyond the scope of petitions and delving into matters of public policy.

This excessive and overstepping role of judiciary has always been used as a tool. The nation of Quaid, has been through a lot of political and governance phases, and with much undue military interferences in its democratic processes, and a concerning amount of military dictatorship, which often has been given refuge under the constitutional umbrella by the courts. With a history and love for legitimising non-democratic and non-constitutional acts, the Judicial wing in Pakistan has lost all its credibility, yet it still reigns supreme. Their powers seem to be that of a god, and our courts have to overlook every matter, let it be foreign policies, executive governance, or Parliamentary procedures and a notorious history of if not, directly sending Prime Ministers home, deeming such actions perfectly aligned under the constitution. The only thing our judicial system, however, fails to do is their actual job, providing justice, as evident by the WJP report, declaring Pakistan to be ranked 130 out of the 142 countries in adherence to Rule of Law (WJP Rule of Law Index. (n.d.), which is the only supposed excuse of our courts when interfering in matters out of their constitutional boundaries. The concept of Separation of Powers seems to be not on hand in Pakistan, where there has been a notorious history of either the Judiciary or the Executive usurping the role of the other two institutions.

In this paper, I contend that the judiciary's role as a panacea for "political governance" has turned into a major problem in and of itself. The extreme inequality in the distribution of wealth and land, the high rate of unemployment, governance issues and the enormous capital deficit demonstrate that the judicature is unable to address the fundamental disparities in society. Furthermore, the extreme overreach of judiciary has caused instances of violations of not only basic human rights, core international law, ethical and moral values, but the constitution itself. It is the responsibility of elected officials to address these disparities by allocating resources fairly, implementing smart planning, and working with a capable bureaucracy. This was not the case. In my view, the law and development theory should place more emphasis on the fundamental structural flaws in emerging nations rather than looking to the court to show the way, and proper reforms should be introduced to implement a stringent separation of powers in between the organs of the state, which would in

turn ensure the rule of law. This paper also discusses that for these fundamentals to be actualised, there must be serious reforms in the judicial wing concerning their constitutional powers, prerogatives, appointments and accountability.

2. Results and Discussions

This paper will explore over the ways in which the judiciary's historical role characterised by its abuse of power, has long been impacting the legislative and executive branches of government. Although our judiciary has been more active in trying to undermine the legislative branch than the executive branch, their abuse of power in both houses is obvious. More examples of the court colluding with deep state institutions to subvert democracy will be shown in this piece. Possible future directions for the country and approaches to address these problems are also covered in this paper.

2.1.What went wrong?

We all know the current state of affairs in the nation, but it's important to identify the precise moment when everything took a turn for the worse. This conversation will centre around that topic. Post the second world war, the politics was evolving around the globe, and the west had come up with a new tool for effectiveness, and they called it the Good Governance Paradigm (Weiss, 2000). According to the "good governance" model, courts should be able to hold corrupt politicians accountable and manage the bureaucracy. Thus, the judicature was the key institution in this procedure (The New Law and Economic Development, 2006). The new requirements for providing economic help to developing nations included judicial changes, new legal frameworks, and discourse on the rule of law. In numerous nations, including Bangladesh, the Czech Republic, Estonia, Lithuania, Moldova, Slovakia, and Pakistan (Ahmed, 2013), courts have taken on the effective role of the Sole Arbiter in political conflicts and interelite fights, in addition to their constitutionally mandated role within boundaries. In contrast, the legislature was mostly ignored, and the liberal democracy promise which is inextricably linked to the market economy, was undermined (Reyntjens, 1991). In numerous nations across the globe, representative democratic institutions were stripped of their authority. Public interest litigation (PIL) and enforceable human rights have supplanted redistributionist politics in political discourse. This was all a part of the global process of creating a minimal non welfare state.

The Muslim League successfully achieved the creation of a separate state. But what next? None of them possessed the necessary knowledge to effectively support a fledgling nation, unless they were willing to take drastic measures, even if it meant compromising the principles of Rule of Law (World Justice Project. 2020). Jinnah's life was tragically cut short following the creation of the state. He passed away only a year later, leaving behind a vulnerable and struggling nation in a highly challenging and hostile environment.

While authoritarian state institutions remained intact, these developments in Pakistan reinforced an already privileged judicial elite against the historically feeble institutions of liberal democracy. During that period, the young nation had to depend on the Judiciary and bureaucracy to address popular struggles, as a way to make up for its weak legislature. This paved the way for the rise of the Bureaucracy, which utilised the Judiciary as a means to legitimise its operatives. In the early 1950s, the judiciary employed Cold War Tactics (LaPorte, 2006) to stifle certain ideologies and discourage calls for structural change and demands for Power Diffusion. The First drawback to this excessive power granted to institutions was seen in Pindi Conspiracy (Zaheer, 1998). Prime Minister Liaquat Ali Khan successfully thwarted the initial assault on democracy in March 1951, with the assistance of "Loyal Army Personnels," most notably Ayub Khan. Liaquat was relieved that he had prevented the civilian government from being taken over by a military dictatorship.

Unfortunately, his success was abruptly cut short when he was tragically assassinated in October of that very same year, in what was deemed a "unrelated attack".

Furthermore, in 1954 the Governor General, Ghulam Muhammad, dissolved the Constituent assembly, and this matter was taken to the Apex court by Molvi Tameez Ud Din (Tamizuddin Khan v. Federation of Pakistan), who legally challenged the dismissal. The courts however, ruled in the favour of the Governor General, and set up the Doctrine of Necessity which in simple words is *"that which is otherwise not lawful, is made lawful by necessity"*. Justice Munir declared that the Constitutional Assembly had *"lived in a fool's paradise if ever seized with the notion that it was the sovereign body of the state."* This verdict dealt a severe blow to the Parliamentary Supremacy in Pakistan, and regressed the democratic norms. This doctrine has been termed as "Constitutional Coup". The verdict opened the door for future judiciary to potentially support actions that are deemed unconstitutional and undemocratic, such as military coups. The doctrine of necessity has been invoked by courts in Pakistan and Bangladesh, and used as a precedent in Nigeria and India (Indira Gandhi's state of emergency call) to legitimise Military Dictatorships (Nyangoro, 1993).

The doctrine of necessity is a perfect practical example of Kelson's Pure theory of law. All revolutionary actions, such as the doctrine of necessity, are perfectly valid and legitimised in a broader context. The highest legal authority can employ the doctrine of necessity within Kelsen's hierarchy of norms to support actions taken to protect the state. Such acts are recognised as legitimate if they follow higher standards and work to keep the legal system stable and operational. In the event that a revolution is successful and a new legal system is established, the necessity doctrine might once more be relevant. The revolutionary acts that made the change possible might be acknowledged as necessary by the new legal system, making them legitimate in the context of the new hierarchy of norms (Stern, 1936).

And shortly thereafter in 1958, the same doctrine was used to justify the martial law imposed by Ayub Khan with the Supreme Court's validation. Throughout his tenure, his authoritarian regime was marked by 11 years of undemocratic rule, election riggings, and flagrant human rights violations. His opponents were unjustly labelled as "Traitors of State" (Minault, 2020). These actions were either ignored or inadequately addressed by the courts.

The Dosso case, was quite similar to the Tameez ud din case, and it had regressive impact and hindered the process of constitutional development. As Hamid Khan writes in his book, *Constitutional and political history of Pakistan* "The importation of a new and untried theory by an obscure scholar to justify martial law and military dictatorship is beyond explanation" (Khan, 2009).

The Supreme Court Judges, in their rush to legitimise the martial law, not only eliminated the writ jurisdiction of the High Courts but also deprived the citizens of their fundamental rights, all in an effort to please the new rulers of the country. CJP further adopted the reasoning that could only be deemed fit to support proper revolutions, to justify a coup d'état. Justice Munir's analogy in this case was critical to democratic and constitutional developments, and supported his previous precedent in Tameez Ud Din case. The fear or uncertainty regarding the enforcement of a just decision should not be a reason to deliver an unjust one. Had he not let his flawed analogy and haste to support the military dictators, hinder his actual duty, the scope of Pakistan's democratic journey would have been entirely different.

The judiciary played a pivotal role in perpetuating political inequality and an authoritarian state during these formative years (Azeem, 2017). General Ayub ended parliamentary democracy in 1958, and the judiciary then collaborated with him to create a primitive and controlled democracy

system known as Basic Democracy (Lombardi, 2017). This system concentrated the benefits of the industrial revolution and Green Revolution in the hands of a small number of wealthy families (White, 2016). Chief Justice Munir, who authored these two decisions opposing the overthrow of elected legislatures, retired in 1958 and became General Ayub's Law Minister. A serving justice, Justice Shahab of the Supreme Court, led a commission in 1960 that recommended a strong Presidential system, and the Chief Justice Cornelius at the time defended the powerful presidential system of 1962 and said that it was upheld as "an article of Faith" (Cornelius, 1967). CJ Cornelius also began grafting Islam onto liberal constitutionalism in an effort to hone the instruments of exclusion and marginalisation even more. The judiciary, led by General Zia, later "refined" this concerning trend of "Islamization of law" in the 1980s (Braibanti, & Cornelius, 1999). This without any doubts set the country in motion downhill, and opened the gateway for authoritarian regimes to takeover without any repercussions, rather full support from the Judiciary, let it be willingly or unwillingly.

If that was not enough, General Ayub Khan strook another nail in the coffin of Pakistan's constitution and democracy via the hammer of the courts, by transferring the Presidency to General Yahya Khan in 1969. By holding the country's inaugural general election in 1970, Yahya Khan chose to postpone the transfer of power to the triumphant Sheikh Mujibur Rahman from East Pakistan. In March 1971, Khan initiated Operation Searchlight with the aim of quelling Bengali nationalism. In March 1971, the Bangladesh Liberation War was sparked. Yahya Khan played a significant role in the tragic events of the Bangladesh genocide (Wikipedia, 2024). All of this was still neglected by the courts, who chose to either remain silent to such blatant violations of fundamental constitutional rights, and basic human rights, or even went as far as supporting these actions up till a certain extent. After the events of the war Yahya transferred power to the first ever civilian martial law administrator, Z.A Bhutto.

The judiciary did not make it easy for the young Barrister to try to establish a new constitution and restore basic democracy in the country. In the 1970s, the judiciary made significant efforts to impede the progress of popular democracy and structural reforms initiated by the popular regime of Prime Minister Zulfikar Ali Bhutto. During a discussion on land reform and nationalisation of industry, Bhutto argued that economic equality is crucial for ensuring equality before the law and enjoying fundamental rights. In response, the Chief Justice of the Supreme Court at the time, Hamood ur Rehman, cautioned against prioritising the ideals of a welfare state over individual liberties, reminding everyone present not to overlook the importance of personal freedoms. The judiciary and a network of influential legal figures strongly opposed Bhutto's vision of 'Islamic socialism' and also disagreed with his proposed parliamentary system outlined in the 1973 constitution, instead advocating for a presidential system (Brohi, 1977).

With such a notorious background, one should not be surprised with the level of comfort the judiciary was at with General Zia Ul Haq, who for another time, suspended the constitution, and employed a state of emergency and subsequently yet another period of Military regime, in 1977 as under "Operation Fair Play" The first order of business for the now President Zia, was to get rid of Mr. Bhutto. Bhutto was detained on September 3, 1977, on suspicion of approving the assassination of Nawab Mohammad Ahmad Khan Kasuri, a political rival. Nevertheless, Zia dismissed Justice K.M.A. Samdani from his position when he deemed the evidence to be "contradictory and incomplete" and Bhutto's release on September 13, 1977. On the evening of September 16, 1977, three days subsequent, commandos from the army "climbed the walls of "Al-Murtaza" in Larkana, rendered all the guards unconscious, and apprehended Bhutto.

In arraignment, Bhutto was brought before the High Court of Lahore rather than lower courts, which meant he was denied one level of appeal. His trial started on October 24, 1977. Acting Chief Justice of the Lahore High Court, Molvi Mushtaq Hussain, who was infamous for harbouring a personal hatred against Bhutto, presided over the appointment of five new justices. Mushtaq was appointed by Zia. Prosecutors accused Bhutto of complicity in a murder. Masood Mahmood, the head of the Federal Security Forces (FSF), testified against Bhutto. He asserted that Bhutto had given the order to kill Kasuri, and that four Federal Security Force members had planned the ambush in accordance with Bhutto's orders. After their arrest, the four individuals accused of being assassins confessed. Though first presented as "co-accused," one of them later recanted, claiming that the other had tortured him into giving false testimony. On the day of the trial, the prosecution asserted that the witness had unexpectedly "fallen ill" and so was absent from court.

On January 25, 1978, as Bhutto began his testimony, Chief Justice Maulvi Mushtaq barred all spectators from entering the courtroom. Bhutto claimed prejudice on the part of the Chief Justice and called for a new trial. His demand was denied by the court. The death penalty was meted out to Bhutto on March 18, 1978 (Schofield, 1979). This speedy trial process of one of the most popular leaders of that era, and the role of judges in a foul play, was termed as a "Judicial Murder" by his daughter, Benazir Bhutto (Benazir, 2008). Thus, once again the judiciary, corroborated with the upper establishment to undermine the democratic mandate of the people, and putting an end to the most popular democratic leader of that time, via a haste and flawed trial process with much outside interference (Ziring, 1981).

Ironically enough, after 44 years the Supreme court recently ruled that Mr. Bhutto's trial was unfair and lacked due process (Hussain, 2024) in a bid to correct the past. The courts seem to have claimed that their predecessors were wrong and unjust, that they were different, reformed and not corrupt like those before them, that they are the ultimate forebearers of justice, and they are rectifying their ancestors mistakes. However, this is not the case. Simply declaring what was done in the past to be illegal and unfair will not cut the chimaeras of righteousness. The Judiciary was and still is the same, just changed faces, yet the same trajectories, roles and intents.

And then came what historians term as the most dark period of Pakistan's history, and perhaps the one in which democracy, the mandate and basic constitutional principles were undermined the most. The 11 full years of Mr. Zia's Government, which our courts fully validated under the shadow of Doctrine of Necessity (Jalal, 1995), and ruled that Mr. Zia's government was fully legitimate, as in the Mrs. Nusrat Bhutto Case. If the judiciary's involvement and love for siding with non democratic authoritarian regimes in the past was not enough, this time they even went as far as literally taking an oath of loyalty, that under no circumstances shall the courts rule against the decisions of the General sahib, if not completely validate them, as under the Provisional Constitutional Order 1981. The courts even turned a blind eye to the General banning all the political parties in the country, meaning that he had effectively curtailed the basic concept of Democracy, and that Mr. President with his Majlis e Shoora reigned supreme Afzal, M. (2018). Zia in an attempt to undo Bhutto's socialist reforms, set the country on the tracks of an extreme islamization and traditionalistic modernity.

Another significant development by the dictator was amending the constitution and article 58(2)(b) through which the President could dissolve the Prime Ministers government and this amendment was fully supported by our judiciary.

Mr. Zia did not stop at this, with the full backing of Judiciary, not that he needed it, many amendments to the constitution were made, totally crushing the concept of the constitution itself. Our courts, which were supposed to be the guardians of the constitution, or Supreme

Constitutional Court, not only neglected this, but also legalised it. Revival of the Constitution of 1973 Order-RCO of 1985 made as many as 65 amendments in the constitution and was upheld by the judiciary in *Yaqoob Ali vs Presiding Officer* (PLD 1985 Karachi 243).

Even Zia and his FSC couldn't declare Bhutto's land reforms un-islamic (PLD 1981 FSC 23), but the superior courts did not stop at that, and took matters in their own hands, declaring Bhutto's land reforms "Un-Islamic" (PLD 1990 SC 99), thus overstepping their role and blocking structural change. Zia's main focus was on thwarting Bhutto's socialist and secular policies and instating core islamic principles in the country. He amended many laws and ratified a shariah based system in the judiciary. This severely impacted the judicial system as well as democratic norms. His introduction of the controversial Hudood Ordinance (Kennedy, 1996), severely impacted the judicial system, but the judiciary bowed to Zia and continued to implement this ambiguous piece of legislation. The courts helped Zia to radicalise and mobilise extremist group, with the ultimate intention of aiming to help US in the Cold war in Afghanistan. The judiciary, not surprisingly, aided all of this with open arms, and not once deeming it illegal or criticising Zia, rather legitimising it.

Curiously, the judiciary persisted in validating dissolutions of parliament even after minimal democracy was restored in 1988. In the years 1988, 1990, 1993, 1996, and 1999 alone, no less than five elected administrations were removed from office. In 1993, when Chief Justice Naseem Hasan Shah reinstated the first Nawaz Sharif government, the judiciary confirmed all dismissals except for one (PLD 1988 Lahore 725).

During the late 1980s and early 1990s, democracy was partially restored; nonetheless, elected governments were constantly threatened with dissolution by presidents supported by the military and the judiciary. There was a great deal of political upheaval throughout this time, and no government had it easy. Pakistan had entered a new era characterised by a robust authoritarian system, a rigid judiciary, and a severely restricted democracy.

The peace was short lived, as Pakistan had to go through yet another Martial Law in 1999, imposed by General Musharraf, after he dissolved Nawaz Sharif's government and declared himself as both the Chief Martial Law Administrator, and the President, and taking control of all key institutions. The Supreme Court as usual, with a soft corner for military dictators and regimes, ruled that Musharraf's regime was totally validated and constitutional and invoked the Doctrine of Necessity (PLD 2000 SC 869).

Furthermore, Musharraf led a "totally democratic" referendum to elect himself as the president which again was upheld by the Supreme Court as valid and declared him as the president.

Judicial oversight of Mushraf's rule and blatant flagrant disregard for democracy, the constitution, and his many revisions was ubiquitous during the years that followed. The Judiciary now had a new accountability arm, the National Accountability Bureau (PLD 2002 SC 853), whose sole mission was to hold politicians to account and ensure they face enough pressure. It is worth mentioning that this military dictatorship was rather unusual in comparison to others, since the judiciary had previously served under the tyrants. In terms of power and influence, the judiciary was on par with the military dictatorship (Pakistan Bar Council, n.d.).

It's also critical to consider the internal dynamics of the judiciary's ascent in this political-economic milieu. In order to detach itself from the executive branch, the judiciary "self-enacted" Article 175(3) of the 1973 Constitution in 1989. This was unique in that the court took action without first requiring the legislature to enact legislation to that effect (PLD 1989 Kar 404). From 1990 to 1995, three Chief Justices employed Islam and PIL in different ways to fortify the judiciary (Lau, 2006).

The Judges' Case of 1996 marked the pinnacle of the judiciary's independence from the legislature and executive branch, as the judiciary entirely excluded both parties from any role in the selection of judges for the higher judiciary (PLD 1996 SC 324).

2.2.End of Military Dictatorship, Start of Judicial Dictatorship

The early 2000s was a very complex era for Pakistan, the post 9/11 tensions, U.S intervention into Pakistan, and operations being conducted on Pakistani soil (Nawaz, 2019), whilst playing an active role in the Afghanistan War (Musharraf, 2006), the international focus on implementing the Good Governance Paradigm, and the country facing challenges to make meet ends with the World Banks demand (Siddiq, 2007), and an existing Military regime, but most importantly, a very overarching Judicial system and superseding judicial activism (Baxter, 2010), shook the country's governance to a whole different level (Lieven, 2011).

The absence of a genuine focus on liberal popular politics and the strengthening of representative democracy was glaring, despite the fact that this aspiration remained deeply cherished by the people. In 2006, the leadership of mainstream political parties found themselves in exile. These parties found themselves in exile not due to the dictatorship, but rather out of concern for the judiciary. In contrast to the widespread Movement for the Restoration of Democracy that took place in the 1980s against General Zia, the political parties expressed their desire for the judiciary to be addressed as a priority. When a BBC representative approached the late PM Benazir Bhutto about returning to Pakistan for the restoration of democracy, she firmly declined. She believed that her presence would be futile as she would be entangled in the courts, dealing with baseless corruption charges. Ms. Bhutto's speeches from 1999 to 2005 reveal her desire to restore the judiciary to its constitutional boundaries. She strongly opposed the interference of the judiciary in politics, citing the example of what occurred in Bangladesh (The Pakistan Observer, 2007). The Charter of Democracy 2006, a significant agreement signed by the leadership of two major political parties of Pakistan in exile, outlined a plan to significantly reduce the authority of the judiciary.

The Judiciary had amassed significant powers, so much so, that it went on par with the Dictator. CJP Iftikhar Chaudhary started backlog cases in Supreme Court, with a prime focus on unveiling corruption and severely criticising executive governance. Chaudhary drastically overstepped his role when he held certain executive intelligence agencies accountable for forced disappearances of anti-military individuals and Human Rights activists, without due process. Chaudhary put enough heat on this matter, and forced these institutions to produce the missing individuals. This all infuriated Musharraf, who now began to realise how powerful the judiciary had become and felt a danger to his own regime, thus had no option but to suspend Chaudhary from his post of Chief Justice, unconstitutionally. Under the influence of his vast powers, Musharraf thought that this would have no drawbacks, however, he was gravely mistaken. Widespread bloody protests and civil unrest followed the sacking of the constitutional head of the Judiciary. Nationwide protests broke out, which turned bloody real quick. Lawyers assembled themselves to fight against a dictator, for the restoration of democracy. In an aftermath of series of violent protests and riots, and international pressure over the restoration of democracy, Musharraf caved in, and restored Chaudhary as the CJP in July of 2007. One should keep in mind that the basic purpose of the lawyers movement (Malik, 2008) was not to restore Chaudhary, but was to put an end to the illegal regime of Musharraf. Thus, the movement continued with all of its zeal and zest, and raising serious concerns over the illegality of the dictators regime, while the judiciary too played a vital part in enforcing those motives by pursuing a hearing in the Supreme Court over the legality of Musharraf as a candidate in the upcoming General elections.

Musharraf, however, with support from the west and vast election rigging, was re-elected as the President, and continued to thwart the democratic mandate of the people. Soon after restoration of the constitution and “limited democracy”, the now President Musharraf declared another state of emergency in November 2007, dismissed Chaudhary alongside 60 other judges, and enacted PCO and demanded that the remaining Judges take an oath under this. Subsequently, the lawyers refused to take an oath under the PCO, and widespread protests and riots broke out and Political leaders too joined forces, and Benazir Bhutto, played pivotal role in these movements, and with colluded international pressure, forced Musharraf to end the emergency rule on 15 December and judiciary was reinstated. Bhutto stated that she was with the ‘independent judiciary’ and ‘not the ‘rebellious judges’.

Tragedy struck when the opposition leader, Benazir Bhutto was assassinated in an “unrelated” attack on 27 December. This again sparked widespread protests and paired with extreme Judicial Pressure, forced Musharraf to resign in August, 2008 and transferred power to the opposition leader, and husband of Ms. Bhutto, Asif Ali Zardari.

From a more dispassionate vantage point, we may see that although the court had overthrown a military regime via the Lawyers' Movement, the legislature was only just beginning to pull itself together after enduring a decade of dictatorship and exile. The courts could now help the legislature gain its due institutional authority; the timing couldn't have been better. However, things took a turn for the worst, and the now ‘strong’ and ‘independent’ Judiciary began to undermine the democratic mandate, and target legislative institutions.

At first Zardari was hesitant to reinstate Chaudhary as the CJP, regardless of his pivotal role in the lawyers movement. Zardari and Chaudhary had a rough start and this created differences between the two. eventually, Zardari agreed to reinstate him, but proposed a revised constitutional bill, severely curtailing the judiciary powers, including the PIL powers (Ibid). Soon Chaudhary lobbied and forced the Parliament to pass the 19th Amendment which drastically increased the CJP's powers. After this began the era where the Judiciary started to interfere in both executive and legislative manners, severely demolishing the concept of Separation of Powers.

In 2009, Pakistan's highest court took up the case of missing persons and demanded that the government turn over detainees who had been kept in secret by security forces. Human rights advocates saw this intervention as a step in the right direction because it highlighted the problem of enforced disappearances. Still others have voiced their disapproval of the judiciary's involvement in formulating public policy, claiming that the responsibility for doing so lies with elected representatives.

Another significant development came in 2012, when the Supreme Court ousted the then Prime Minister, Yousaf Reza Gillani, over contempt of court charges for not allowing to re-open corruption cases on Asif Ali Zardari (2012 SCMR 519). The judiciary's decision to disqualify a democratically elected leader in this manner raises concerns about the potential infringement on the rights of the Parliament and the public to choose their own representative. Critics termed this as the period of ‘Judicial Coups’ (Virtual Judicial Coup).

The interference of the judiciary in almost every significant act of the legislature has greatly hindered its effectiveness. The Chief Justices actively visited public institutions, closely examining each appointment and monitoring their functioning (2016 SCMR 992). Even the health department was under the scrutiny of the hyper-active judiciary. They also took steps to regulate prices of essential commodities like sugar, electricity, flour, and more (PLD 2014 SC 350). The judiciary not only monitored the allocation of development funds by legislators (2013 SCMR 1017), but also intervened in development projects (CP No.68/2010) and began to function as a development

agency. The judiciary, under the leadership of Chief Justice Saqib Nisar, made a bold promise to the Pakistani people to construct dams for the nation, showcasing their ambitious vision. Opening a dam fund under its own name was an unprecedented move by the Court, setting a new global standard (2018 SCMR 2001).

Following a prolonged period of pursuing victimisation of democratic representatives and targeting politicians under the guise of corruption, the judiciary made a significant move by targeting the top leadership of the upcoming ruling party, PML-N, in 2017. The judges found the sitting PM Nawaz Sharif guilty of corruption and pursued him until he was sent to jail. They also succeeded in permanently disqualifying him from holding any electoral office (PLD 2017 SC 692). And by this point it was evident that there was an uneven application of Law. While, some politicians and parties were severely targeted, the others were let free and were the supposed favourites of the courts. Although the judiciary is expected to remain completely autonomous and impartial, there have been instances of political influence.

2.3. Frankenstein's Monster; Imran Khan, The Pakistani Military's failed experiment

In the recent decade, following the ousting of PM Nawaz Sharif, the establishment launched their favourite blue-eyed boy (Kugelman, 2018). The Media campaigns for Imran Khan started way earlier, somewhere immediately after General Pervaiz Musharraf's resignation and the restoration of limited democracy. Mr. Khan was elected as Prime Minister, following the 2018 elections, which were even termed as the "Dirtiest elections of Pakistan" (BBC News, 2018). However, Mr Khan was merely a ceremonial head (Hussain, 2019), a mere puppet in this power game. The real talking was done by the higher ups (Siddiq, 2019), and Khan merely accompanied them. This was evident when Mr. Khan granted an extension to certain a certain figure, who may or may not have brought him to power, and which was fully upheld by the Supreme Court (CP No. 39 of 2019), and later legislated via the parliament.

The cricketer turned politician employed dirty tactics and his rule saw the most vilest of political victimisation. The Judiciary's extended arm created by a Military dictator to keep the politicians in check, was used once again as dirty fascist tactics to suppress popular demands and also Khan's political rivals.

During Imran Khan's tenure as Prime Minister of Pakistan, charges of political victimisation escalated, with opposition politicians being targeted and imprisoned in large numbers. The judiciary, inspired by systems established during military rule, was accused of being used to crush dissent and target Khan's political opponents using what many saw as fascist techniques.

Leading opposition politicians faced various legal battles. Nawaz Sharif, the former Prime Minister and leader of the Pakistan Muslim League-Nawaz (PML-N), was convicted to prison (Carnegie Endowment for International Peace, 2024). The former Finance Minister, Ishaq Dar, was branded an absconder by the National Accountability Bureau (NAB) and has stayed in self-exile in London, fearing political reprisal (Imran, 2017).

Saad Rafique, along with his brother, were detained in the Paragon Housing scam case (Bilal, 2018). Maryam Nawaz, Nawaz Sharif's daughter, was detained in connection with the Chaudhry Sugar Mills case and transported to Adiala Jail (Waqar et al, 2019).

Other prominent arrests included former Prime Minister Shahid Khaqan Abbasi in the LNG case (Khattak, 2019) and Defence Minister Rana Sanaullah, who was detained by the Anti-Narcotics Force on drug possession charges (Naseer, 2019). After attacking important PML-N figures, attention switched to the Pakistan Peoples Party (PPP). Khursheed Shah was detained for hidden assets (Khattak et al. 2019), while Faryal Talpur, the sister of former President Asif Ali Zardari,

was placed under house arrest (Haider, 2019). Zardari was arrested in June 2019 on suspicions of money laundering and using bogus bank accounts (Reporter, 2019).

Shehbaz Sharif, the Leader of the Opposition in the National Assembly, was arrested by the NAB in September 2020 for money laundering and owning assets other than those from known sources of income (Bilal, 2020). His son, Hamza Shahbaz, faced similar allegations and was jailed in June 2019, before being granted release in February 2021. Former Interior Minister Ahsan Iqbal was detained in December 2019 in connection with the Narowal Sports City project, however he was released on bail in February 2020.

Former Finance Minister Miftah Ismail was arrested in August 2019 in connection with the LNG import issue and released on bail in December 2019. Senior PPP figures, including Qamar Zaman Kaira and Khursheed Shah, were also called or detained by the NAB on various accusations. Shah spent more than two years in custody before being granted bail.

During this period, practically the entire leadership of the Pakistan Muslim League-Nawaz (PML-N) and key officials from the Pakistan Peoples Party (PPP) were imprisoned or pushed into exile. Many say that the cases against them were fabricated and politically motivated, reflecting a larger policy of using legal institutions to repress political dissent and weaken resistance.

The widespread arrests and legal actions against opposition leaders under Imran Khan's PTI government have sparked worries about the manipulation of accountability processes for political advantage (DW). The National Accountability Bureau (NAB), which was established to combat corruption, was widely criticised for its selective targeting, notably of political opponents. This perceived prejudice weakened public trust in the judiciary and accountability mechanisms, indicating a shift from impartial justice to political revenge.

Critics claim that these moves represent a larger authoritarian trend within the PTI government, which uses state institutions to consolidate control and crush political competition. This strategy not only weakens democratic norms, but also draws focus away from true accountability and governance changes. Political victimisation during this time period demonstrates the fragility of Pakistan's democratic institutions and the persistent influence of authoritarian tactics in its political culture.

Khan's government was criticised internationally of its restrictions on media (Human Rights Watch, 2022) and critics of the government. The condition of the human rights and democracy itself was called into question by the EU (Arab News Pakistan, 2023). Khan's Government was called to be more corrupt than those before them, which was ironic, as Khan's whole election motto was that he was the only honest and "Sadiq and Amin" leader, while all others were corrupts, deserving to be punished.

However, PTI and Mr. Khan's period of political revenge was short lived. Following some international events and policy decisions, the King-Makers in Pindi soon realised the monsters they once created have turned against them. Khan's head became so filled up with power and he needed more and more to satisfy his ginormous ego. Furthermore, Khan's visits to Russia and China, and his strict statements angered the US (App, 2021), whose interests were at a risk. The Prime Minister wanted to subtly shift his country's alliance with the eastern power axis, but the west was in content over this. His geopolitical stance led to his political isolation. Combined with strained relations with the Military over key appointments and policy changes, the higher ups decided that they should discard their out of control puppet. Thus, on april 3 a vote of no confidence motion was raised in the national assembly, but the deputy speaker Qasim Suri simply dismissed it (Chaudhry et al, 2022) and dissolved the National assembly. But the apex court intervened and

took suo motu, issuing an order requiring the Deputy Speaker's verdict to be scrutinised and its legality or otherwise determined, as well as any further acts, including the dissolution of the National Assembly.

Despite being a hasty action, it worked to calm the nerves and lessen tensions. Four days later, the Court issued a short order nullifying the Deputy Speaker's decision and all subsequent acts. The Court also directed the Speaker to begin the no-confidence proceedings on April 9 and complete it on the same day. Even though the session was called on 9 April, the Speaker was reluctant in continuing with the motion and delayed it till midnight. Mr. Khan at this time was not present in the assembly and was allegedly at the Prime Minister office. The crisis reached climax when the news flashed that Khan may denotify the then COAS Qamar Javed Bajwa and appoint his successor later that night. Following this, two events occurred. In an act of extreme judicial activism, the Supreme court and Islamabad High court offices were opened at midnight, and the benches were called into session by the respective Chief Justices. At the same time, it was alleged that the then Chief of Army Staff alongside some cavalry and reinforcements paid a personal visit to Khan, who was in the PM office at that time. Similarly Seeing all of this, shortly before midnight, the speaker returned to his place and announced his resignation. In the absence of the Speaker, the Deputy Speaker takes over; however, either bewildered by the day's events or scared by the sight of jail vans, he ignored the Deputy Speaker and summoned the PML(N)'s Ayaz Sadiq to take over and conclude the proceedings. The night in between 9 and 10 April was perhaps the most eventful night in the constitutional history of Pakistan. Mr. Khan was ousted as the PM, and was the only PM in the history of Pakistan to have been voted out (BBC News, 2022). The courts displayed an unprecedented move of calling a session at midnight, which according to them was to protect and uphold the constitution (Asad, 2022), but some argued and claimed that this action came as a result of external influence of "jeeps" (Pakistan Today, 2022).

Following this, on 22 August, he was charged with anti- terror laws, but the charges were later dropped. Later in the same year, Imran Khan was subject to an assassination attempt while in a rally protest where he was shot three times in the leg. Khan blamed the establishment for this attack (CNN, 2022) and named senior ISI and Military officials as masterminds behind the attack. Realistically, this attempt was either planned by the PTI- Chief himself, or was meant as a warning. Looking at the historical efficiency of the Pakistani intelligence and the institutions in matters of this regard, they would have certainly not missed.

If this was meant to scare Khan off, it certainly did not work and instead made him into an even bigger figure. Previously, PTI was the populous demand, but now it was Khan. PTI is Khan, and Khan is PTI. In contrast to the PMLN and PPP, the PTI is not a dynastic party, it never was. Khan's party was always destined to collapse like a house of cards. When he was in power, he couldn't make his party into something greater than himself, it meant that Khan was the PTI and the PTI was Khan. And that was Khan's issue as well as the establishment's opportunity.

Following this, a series of events occurred, but most important was the May 9th attacks. Khan was presented in a case in the IHC, from where he was arrested by the Paramilitary forces which broke in the courts premises, completely desecrating the sanctity of the courts, breaking windows and doors. PTI termed his arrest as an abduction at gunpoint, and as an unconstitutional move carried out with such sheer intensity. Khan who was still recovering in his leg from the attacks, was manhandled and dragged out of the premises and was taken away (ITV News, 2023). What followed afterwards is termed as the 9/11 of Pakistan. Civilians gathered in protests and those protests soon turned violent. Attacks on Military installations, Cantt areas and buildings causing havoc and a state of emergency all over Pakistan.

2.4.Post 9 May- The Mix Circus in Power

The 9 may incidents were a turning point in the history of Pakistan. This is where the hypocrisy and corroboration of the judicial wing of Pakistan got exposed to the public. From arresting civilians en masse, to violence and use of excessive force, and the strict actions taken on the perpetrators, and political leaders, this was indeed yet another dark chapter in the history of Pakistan. To discuss it properly and in detail would require a research paper of its own or perhaps a book.

2.5.Separation of Powers; an alien concept in Pakistan

The concept of separation of powers, first highlighted by Montesquieu in 1748 and drawing substance from Aristotle's theories, entail the division of government into three distinct branches: the legislative (responsible for lawmaking), the executive (tasked with law implementation), and the judiciary (responsible for law interpretation and enforcement). The purpose of this system is to ensure that no one or any organisation may acquire excessive authority, whereby each branch regulates the actions of the other, maintaining a system of checks and balances. The act of separating powers is crucial in contemporary legal systems serving a prevention of the misuse of authority and safeguarding against oppressive rule by distributing governmental duties among several branches. The primary objective of this division is to prevent the risks associated with excessive concentration of power to a small group of people or a singular institution, which may result in abuse and authoritarian rule. The statement coined by Lord Acton, "absolute power corrupts absolutely," emphasises the importance of safeguarding democracy by maintaining a balance of power within the government, rather than pursuing separation as a goal in its own right. The proper operationalisation of this idea has been impeded by a number of issues, such as entrenched corruption, military incursions, and political instability. As a result, even though Pakistan's constitution recognises the idea of separation of powers, complete implementation of this principle has proven to be an elusive objective.

Institutions, particularly the Judiciary and Executive have significantly overstepped their role in the past, crushing the boundaries of powers between these essential organs of the state, as delineated under the concept of SOP. From Military interferences in Judicial wing, to Judicial interference in the Legislative wing, and the extensive overstepping roles of the legislature in the past, the lines have been blurred and crossed far too many times.

2.6.Rule of Law; but which law exactly?

By establishing a "higher law," a constitution ensures that no branch of government remains above the law, binding even sovereign entities to its mandates and also it will promote clarity in Pakistan's political and legal working. The Rule of Law is a foundational concept in political ethics, emphasising the supremacy of law and the importance of legal institutions in governance. It encompasses both formal and procedural principles that dictate how a society should be governed. Formal principles include the requirements that laws be general, clear, public, stable, and forward-looking. Procedural principles focus on how laws are applied and enforced, highlighting the need for processes to be fair and for institutions like courts to be independent. Some interpretations also integrate substantive ideals, advocating for fundamental rights such as liberty and the protection of private property.

In his work, Aristotle highlighted the primacy of the rule of law above individual control, asserting that "the rule of law is much superior to the rule of man." He warned against the perils of governing based on personal caprice. Montesquieu's influential contributions to the concept of the Rule of Law, as outlined in his work "The Spirit of the Laws," emphasise the importance of the separation of powers. He asserts that the judiciary must function independently to uphold the laws. Similarly,

John Locke supports the rule of law and argues that tyranny arises when there is a lack of legal boundaries. He emphasises the need for government to be constrained by laws that align with the will of the people. Both Montesquieu and Locke advocate for the Rule of Law and the Separation of Powers to be upheld.

This means that both of these notions, the Rule of Law and Separation of powers go hand in hand. One cannot attain the other without fulfilling the requisites of the former.

The judiciary needs to be impartial and unaffected by outside forces in order for the rule of law to function effectively. This includes being free from governmental sway, military intervention, and other types of corruption or coercion. Sustaining this independence requires judicial appointments, tenure security, and sufficient funding.

In Practice there is a very strict contrast from mere theoretical works. The only rule of law that prevails in Pakistan is the Murphy's Law (strategypage, n.d.), especially in matters of power games. Anything that can go wrong, will go wrong.

2.7.A way forward? Reforms and Retributions

The discussion earlier concerned where and how the judiciary's overstepping role led to a constitutional crisis and create hinderance in Governance, interfering with public policy and matters that should be left to the discussion of the general populous. A review on the ideas of the Rule of Law and the Separation of Powers was held, along with a probe of how these fundamentals are actually implemented in Pakistan. The following text is a contentious discourse on what could the possible remedy be, that concerns fixing the judicial system, subsequently, restoring true democracy in the country, and what would it take to attain a true rule of law, which cannot go without a proper separation of powers between the institutions.

Given the power, independence, and security of tenure of the judiciary, the selection process for judges is of utmost importance. Unlike other institutions, they are chosen through a selection process rather than being elected. Therefore, the public has no say in their appointments, but their decisions and actions have a significant impact on the lives and interactions of the general population. The public has expressed concerns about the authority of judges to intervene in executive and state operations, as well as their role in developing laws, particularly the common law. These concerns stem from the fact that judges are not elected by the public and therefore lack democratic legitimacy. Therefore, it is crucial to establish a transparent system of judicial appointments in order to foster trust and accountability among the population and to somewhat level the edge. As Aharon Barak pointed out, The judge "has neither a sword nor a purse,". He only has the trust of the populace. It is pertinent for the judiciary to uphold public trust and maintain a sense of legitimacy. Additionally, there should be a level of accountability to the public for their actions. In Pakistan, this can only achieved by creating a Judicial Appointments Commission, as the one in UK. Although a commision already exists for this purpose, namely the Supreme Judicial Commision, but its working has no transparency. Judges are still selected in secretive meetings also called "Secret Soundings" or "Tap on shoulders behind closed doors". There is extensive interference of Political actors as well as the military in selecting and recommending judges, which then proceed to serve with biasses in their career. A commission that is led by diverse and unbiassed and non-political selectors, and a selection method which is both fair, open and transparent, is the possible way forward.

The need for these reforms is not to ensure solely Judicial independence but also to make sure that the parliament has its due sovereignty and supremacy. And that the democratically legitimised representatives in the legislature do no fall subordinate to the will of corrupt judges or to a power hungry general. The people can grab by the collar a strong politician and hold him accountable,

but cannot do so to a weak general or a corrupt judge. That is why it is imperative that there must be proper legislation drawing judicial and executive boundaries, and to make sure it is the mandate of the people that is supreme.

The vast authority vested in the courts in the name of the Supreme Constitutional Court and judicial review needs to be tamed. Drastic measures must be taken such as an overhaul of the current constitutional setup to something a bit more practical, like the UK, an uncodified constitution. The seminal case of the US Supreme court, *Marbury V Madison* where the courts circumscribed that in a formal codified constitutional setup, a constitutional court's existence is necessitated, which serves to oversee all legislation which is enacted by the parliament, is in line with the constitution. This undermines the Parliaments legislative authority and puts a restriction on it. Contrary to this, in the British System, a lack of such constitutional setup leads to the Parliament being the supreme authority, giving it vast powers to enact any laws or statues, while being immune to such scrutiny from the courts. The judiciary is constrained to the task of interpretation, without the authority to nullify legislation or render it null and void. This ultimately ensures Parliamentary Supremacy, and would ultimately lead to a more separated framework with little interference in the functionality of the Legislature, Judicature, and the Executive from one and another, ensuring the above mentioned concept of a true liberal democracy. The Judiciary alongside the legislature must work on to repealing all overriding laws, extra constitutional and emergency legislation and shut the doors for any possible future regimes to make a mockery and stomp over the constitution and treat all legislation and mandate of the populous as a Constitutional Dustbin.

3. Conclusion; May God Have Mercy On Pakistan

General Zia's extreme Islamization of the ideologies of Pakistan put it in a period of islamic modernisation. Islamic Nations whose identities are often based on Islamic Ideologies intertwined with cultural and traditional norms face modernity in one of 4 ways. The first one being the total emulation of western secularism based on the French Model (i.e in Turkey). The second is the Islamic Modernity, which aims to make Islamic laws compatible with modern times, as seen in Morocco and Tunisia. The third is the Traditionalistic Approach, employed in Gulf and Saudi, who maintain the no need for change motto. Lastly, the fundamentalist approach as seen in Iran, which seems to reject every other system and oppose modernisation. Pakistan seemed to go on a traditionalistic modernisation pattern, and it did. But there was a setback, the implementation of a new setup by a military dictator, and that too in a very short span, and at a very fast pace had its setbacks. Modernity takes away the restrictions of traditions and wants, creating a negative freedom and simultaneously creates what Durkheim (Wickert, 2023) terms anomie, the loss of certainty of past. This normative uncertainty creates a propensity to fall for authoritarian solutions that substitute for the uncertainty (Fromm, 1941). Something that replaces the old community with a new authority which tells people what to think and what to act, therefore giving them back the certainty they need. This psychological contract is a strong aspect in the Arab and Muslim Social Contract, *the authoritarian bargain* (Afsah, E. (2008)). This is exactly what happened in Pakistan. People not only did not oppose these authoritarian solutions, rather accepted them with open arms. The Pakistani alternative of Bread and circuses became the "*Roti, Kapra, Makan*", and the higher ups made sure to engage the general population in trying to maintain these basic needs, so that they would not think any further, question any further, or demand their actual rights. This is one of the major reason why the judiciary, alongside Military have been so much dominant in Pakistan's governance.

Following their setback in the Lawyers' Movement, Pakistan's deep state strategically recovered power by taking advantage of a system with a weak legislative and a powerful judiciary. This

judicial power was initially bolstered by civilian efforts to prevent military overreach, but it unintentionally became a tool for the military to impose its agenda. Over time, the judiciary has been co-opted to suit military goals, frequently justifying actions that violate democratic principles. Instead of direct military coups, the tactic has switched to using the electoral process to impose governments regarded as extensions of military power. The long-held dream of establishing a liberal democracy in Pakistan has been sidetracked once more. The judiciary, formerly regarded as a bulwark of resistance to dictatorship, now serves as a facilitator of military control. This judicial activity erodes public trust and strengthens an authoritarian rule under the appearance of judicial legitimacy.

An examination of this phenomenon reveals Pakistan's democratisation's obstacles. The way in which the military and the court interact serves as an example of how institutions can be repurposed to further authoritarian objectives. A worrying trend towards illiberal governance is indicated by the undermining of electoral integrity and the deterioration of democratic norms. The real power balance is still highly skewed in favour of the military despite civilian governments, which feeds the vicious cycle of weak democratic institutions and strong authoritarian forces.

Extensive judicial reforms, Judicial Appointment commissions, Public Audit commissions, accountability processes, legislations and possibly a shift in the constitutional setup to something like that in UK, an uncoded constitution, which allows Parliament to be sovereign and supreme, and restricts the courts to the mere task on interpretation, is needed.

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