

The democratic seesaw law constitutional administrative essay

[Law](#)



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CHAPTER I

INTRODUCTION AND METHODOLOGY**The Democratic Seesaw**

Background. 14 Aug 1947 saw the creation of a new nation in the form of Pakistan, under the guiding hand of " Qaid-e-Azam" (Father of the Nation) Mohammad Ali Jinnah. Contrary to popular belief Mr Jinnah was not merely a bourgeois nationalist or a fundamentalist, as many would like to portray him. In fact, he was a liberal democrat with secular orientation[1]. He is, in fact, known to have stated unambiguously about Pakistan that " democracy is in our blood, it is in our marrows"[2]. However, ironically, the birth of Pakistan through the concept of the " Two Nation Theory" propounded by Mr Jinnah is steeped in religious colour, as the basic tenet of the theory itself was religion. The world in general and the Asian region in particular have seen the emergence of Islamic nations over the past century, including those from the erstwhile Soviet Union, with Islam as the predominant religion. The birth of Pakistan is also, possibly, a logical outcome of religious majority desire in the region. Jinnah's death due to tuberculosis on 11 September 1948 resulted in Pakistan being set on a course that he may not have approved of. [3]However, the birth of Pakistan is not under the scanner in this paper.

Suffice to say that the birth of the nation of Pakistan and its existence as a rightful entity in the comity of nations is accepted as it is. Nevertheless, Pakistan has faced multiple upheavals in its short history. In particular, the here now – gone tomorrow characteristic of Pakistani democracy has been one of the key attributes of the country over the years. The causes for this could be manifold, significant among them being the dominant and assertive

armed forces, specifically the Pakistani Army. This has been the cause of long standing politico-military conflict and has resulted in as many military rulers as democratically elected ones. The country has also witnessed adoption of four different constitutions, as well as revoking of the same number by successive regimes, both civilian as well as military. Significantly, it took nine years for the first constitution to be framed and a few more before it was formally accepted[4]. The genesis of such upheavals may be traced to Sep 1948, when Mr Jinnah passed away, leaving Pakistan virtually orphaned and without a leader of comparable stature or charisma. However, the conflicts came to the fore only under Governor General Ghulam Mohammad, who started the practice of summarily dismissing governments. This has, thereafter, been replicated numerous times with alarming regularity.[5]A detailed chronology of important events in Pakistan's history is placed at Appendix A.[6]Recent Events. Pakistan has seesawed between military rule and democracy for over six decades now. The question is, when both the military as well as politicians lose their credibility, then what? Pakistan, today, is in danger of turning into a toxic 'jelly state', a quivering country that may neither collapse nor stabilise.[7]The past few years have witnessed relative stability on the democratic front, in the post-Musharraf era. However, a new concept that has emerged in recent years is a resurgent and possibly activist judiciary. The ouster of Gen Pervez Musharraf can be attributed to the Chief Justice of Pakistan's Supreme Court, Mr Iftikar Chaudhary, in large measure. This saw the military marching back to the barracks (ostensibly) and the re-emergence of democracy. However, in the last few months, the ethos of democracy has been put under question once

again. Significantly, this challenge comes not from the military, as is usually their wont, but from the judiciary. Whatever happens in Pakistan always has ramifications in India and due to the position Pakistan occupies in the USA matrix, the effects may actually affect the entire world. Judicial activism, in this form, wherein there is an evident and direct confrontation between the judiciary and the executive, is a phenomenon that has not been witnessed in the region earlier and the public support that it seems to have garnered raises several questions. In a country beset with a wide variety of internal as well as external problems, does this not add another dimension to the turmoil? Has the judiciary overstepped and exceeded their mandate? Is the current situation only a judicial issue or are there greater, deeper political ramifications that need to be understood? The most significant question, however, is that, ' In a country where the judiciary has removed a legally and constitutionally elected Prime Minister and ordered the arrest of another in close succession, can the very institution of democracy survive?' METHODOLOGY

Statement of Problem

To examine the shift towards activism in Pakistan's judiciary and assess its effect on the traditional politico-military set up and survival of the very institution of democracy in that country.

Hypothesis

The perceived activist approach of the Pakistani judiciary, in recent times, will add to the omnipresent politico-military turmoil in that state and threatens the survival of Pakistan's perpetually nascent democratic setup.

JUSTIFICATION FOR THE STUDY

The Judiciary in Pakistani Politics

The Traditional Judiciary. In the conundrum of politico-military squabbling, that has been characteristic of Pakistan, the judiciary had, by and large, chosen to remain a non-participant. The judicial system had succeeded in remaining largely independent and non-partisan. The qualification of ‘largely’ arises from the fact that, in a few instances, the courts have held military takeovers to be justified due to prevalent conditions in the country at that juncture.[8]In fact, the judiciary has historically endorsed assumption of power by the army in all past instances of the armed forces usurping power.[9]This situation has altered dramatically over the past few years. The ouster of Gen Pervez Musharraf as Pakistan’s President, Chief Executive Officer and Chief of the Army Staff, was direct consequence of an active and aggressive judiciary, led by a combative Chief Justice, Mr Iftikar Chaudhary. The said gentleman was removed from his post by Gen Musharraf, and the public outcry and outrage that followed initiated a spate of events that eventually saw the dictator giving up his powers. Present Scenario. If the removal of a dictator was an example of public activism, what ensued in the early months of 2012 was certainly quintessential judicial activism. The Supreme Court of Pakistan caused the removal from office of the democratically elected Prime Minister of the country. The Supreme Court stretched its jurisdiction in this case, charging the then Premier Gilani with contempt of court, despite no petition being filed against him. The court further accused PM Gilani of ridiculing the judiciary as he refused to write a letter to Swiss authorities against President Zardari. Mr. Gilani was of the

view that the Constitution didn't permit him to write a letter against the President, adding that Heads of States across the world enjoyed immunity, so why not in Pakistan?[10] This has led to widespread debate, not just within Pakistan, but around the world and particularly in India, where these events could manifest in a multitude of effects. The eviction of Mr Yusuf Raza Gilani from the Prime Minister's Office led to a minor furore in Pakistan and has been the topic of extensive debate about the rights and wrongs of any judicial system. Cases from around the world have been quoted ad nauseum with the print media devoting thick daily columns to the issue, while the visual media found another reason for anchors to claim breathlessly that this was a new era in Pakistan. It is opined by some that the Pakistan Supreme Court has embarked on a perilous path of confrontation with the political authorities, which can only have disastrous consequences for the country. Recently its Chief Justice said that the Constitution, not Parliament, is supreme[11]. This is undoubtedly settled law since the historical decision of the U. S. Supreme Court in *Marbury vs. Madison* (1803). The reactions to the incident would, possibly, have given Mr Gilani's successor, Mr Raja Pervez Ashraf some hope for an easier time with the judiciary, however, this was not to be as he faced an equally combative bench and has the same challenges to overcome. The strained relations between the primary players in the entire scenario took a turn for the worse when the courts ordered the arrest of Mr Raja Pervez Ashraf on charges of corruption emanating from a separate case. This particular chapter in the saga is yet to be taken to its logical conclusion. Significantly, the military, for once, seems to be waiting and watching, at least on the face of it. Is this really the case or is there a deeper

role of the military that is yet unseen? Essentially, the question of democracy in Pakistan surviving this fresh onslaught, from an unexpected quarter, merits examination.

STRUCTURE OF RESEARCH

Scope. The scope of the paper has been limited to the relationship between the judiciary, executive and military in Pakistan. The fact that judicial activism has emerged only in recent months has resulted in the primary focus of research on this particular aspect being based on newspaper articles and editorials. The issue being contemporary, there is a distinct lack of formalised published literature, which is largely limited to essays and articles. The study will focus on the traditional, historical relationship between the three instruments in question and the direction it points to.

Data Collection. The primary source of research, in terms of historical perspective and examination of judicial activism as a subject will be based on books published by eminent authors from around the world, including India and Pakistan, so as to obtain a balanced, unbiased perspective. Essays and newspaper articles, editorials will also form a part of the research process. A bibliography of sources is placed at the end of the paper.

Organisation of the Paper. The paper is structured along the following contours:-

(a)Chapter I. This chapter covers a brief introduction to the topic and the justification for the study. It also enumerates the methodology and approach used in formulation of the paper.(b)Chapter II. – This chapter delves into the history of Pakistan’s political structure. It traces Jinnah’s vision and the

struggle for a Constitution over many years post-independence. The history of Pakistan's polity has been divided into three phases for examination, viz. pre 1971, post-1971 till 1999 and finally 1999 till 2013.

(b)Chapter III. This chapter examines the judiciary in Pakistan, including its history. The chapter also examines the judicial stance during phases of military and civilian rule.

(c)Chapter IV. The origins and definition of judicial activism are dealt with in this part of the paper. Instances of judicial activism in other parts of the world, including India are also examined, along with reasons for democracy to survive in these nations.

(d)Chapter V. Pakistan's experience with judicial activism is looked into through this chapter, whilst also providing a backdrop of the state of the country. This assumes relevance as the origin of the current imbroglio between government and judiciary lies in these problems.

(e)Chapter VI. The paper concludes with an analysis of the future of democracy in Pakistan, whilst providing an overview of the main players in the current situation.

CHAPTER II

" In any case Pakistan is not going to be a theocratic state to be ruled by priests with a divine mission. We have many non-Muslims-Hindus, Christians and Parsis -- but they are all Pakistanis. They will enjoy the same rights and privileges as any other citizens and will play their rightful part in the affairs of Pakistan. "[12]

THE POLITICAL JOURNEY OF PAKISTAN

The Constitution of Pakistan

10. The First Constitution – 1956. Since independence in 1947, Pakistan has been plagued with the problem of drafting of a suitable constitution and once drafted the acceptance and adoption of such a document by all stakeholders. In 1947 Pakistan did not possess a constitution of its own. As a consequence, The Indian Independence Act of 1947 and the Government of India Act 1935, coupled with a few amendments, were adopted as the working constitution.[13]A constituent assembly was formed with an aim of formulating a constitution for the nascent nation. This constituent assembly passed an ‘ Objectives Resolution’ in March 1949 propounding the broad goals and framework of a future constitution. However, the demise of Jinnah in 1948 left the field open for narrow self-interests of various political groupings to come to the fore. Successive Prime Ministers were unable to bring out a document which met consensus. Finally, it was only in 1956 after four Prime Ministers had been changed and a fair amount of bad blood created that the constitution was adopted. However, this was only the first of multiple constitutions to come.[14]11. The Second Constitution – 1962. The ascent of Gen Ayub Khan as the President, following a military takeover, saw a new constitution being framed, which was brought into force in 1962. This constitution saw the perpetrators of the 1958 coup retaining a privileged position. Military rule was brought to an end but power remained centralised in the hands of Ayub Khan.[15]Significantly, the basis of this constitution was a report framed by a commission headed by a member of the Judiciary, Justice Shahabuddin.[16]Although the Governor Generals of Pakistan had

enjoyed sweeping powers, prior the 1956 constitution, this was the first time the President was made all powerful in the political system of Pakistan. This version of the Pakistani constitution survived the Ayub Khan years, as well as, the Yahya Khan years, but was replaced once again in 1973.[17]12. The Third Constitution – 1973. The 1971 war saw not just the formation of Bangladesh, but also the fall of Yahya Khan, who handed over the reins of the nation to Zulfikar Ali Bhutto. A fresh committee was formed to once again frame a constitution in 1971. This constitution envisaged a Parliamentary form of government for Pakistan and was inaugurated on 14 August 1973. It was this constitution which established the lines of demarcation for the branches of government. The judiciary as it exists today is largely a product and a manifestation of this constitution.[18]

1947 – 1971 – Lost Vision and Dismemberment

13. Jinnah's Vision. The founder of the nation, Quaid-i-Azam Mohammad Ali Jinnah envisioned Pakistan as a modern democratic state to be run strictly on the basis of merit and where all citizens would be equal before the law. Jinnah's ideas about what the new state should be like were very clear as can be seen from his speeches and statements. He meant Pakistan to be a progressive state in which there would be scope neither for intolerance nor for obscurantism and whose highest aims would be expressed in the social, cultural and economic uplift of the masses. Before the establishment of Pakistan, the first public picture of Pakistan that Jinnah gave to the world was in the course of an interview in New Delhi (1946) with the correspondent of Reuter's news agency: the new state would be a modern democratic state, with sovereignty resting in the people and the members of the new nation

having equal rights of citizenship, regardless of their religion, caste or creed.

[19]14. 1956 – 1971 – The Advent of Military Rule. Pakistan declared itself an Islamic Republic on adoption of a constitution in 1956, but civilian rule was stalled by the 1958 military coup d'état by the army chief General Ayub Khan. The military, under Ayub Khan, ruled Pakistan during a period of internal instability and a second war with India in 1965. Since then, the military has often intervened in the democratic process by accusing successive civilian governments of mismanagement and corruption.[20] Ayub Khan's tenure was marred by widespread dissent and dissatisfaction, leading to deep fissures and unrest through the country. This was followed by Ayub Khan conspiring with the military to retain control over the nation as he tried his level best to hold on to power.[21] Following the war in 1965, Ayub Khan found it difficult to hold on to the seat of power and resigned. This led to his successor General Yahya Khan declaring martial law and assuming the presidency.[22]15. The Birth of Bangladesh. Economic grievances and political disenfranchisement in East Pakistan, in 1970, led to violent political tensions and army repression, escalating into civil war followed by the third war with India. Pakistan's defeat in the war ultimately led to the secession of East Pakistan and the birth of Bangladesh. This also rang the death knell for Yahya Khan's presidency and the military's control over Pakistan for the time being. Yahya Khan was replaced by Zulfikar Ali Bhutto, who had occupied varied important portfolios in the government, including the military government, primary among them being the post of Foreign Affairs Minister. His ascent to the chair of President was a logical outcome of the war and the fact that his party had swept the polls in the 1970 elections, in West

Pakistan.[23]Bhutto, however, assumed the presidency in the gravest period of Pakistan's history and his tenure should also be viewed in that backdrop.

1971 – 1999 – Struggling for an Identity

16. Bhutto - An Era Cut Short. Bhutto was the first popularly elected leader of Pakistan, but he had a love hate relationship with the military, which ultimately led to his eviction from the seat of government.[24]Civilian rule under Zulfikar Ali Bhutto, survived from 1972 to 1977, until he was deposed by General Zia-ul-Haq, who became the country's third military president. Significantly, the judiciary played a crucial role in this phase of Pakistan's history, though ostensibly under the influence of Zia. The judicial verdict to award the death penalty to Bhutto would later become the foundation stone for creation of the personality that was Benazir Bhutto.[25]Bhutto's short lived tenure at the helm of Pakistani affairs lasted merely five years, till 1977 but saw multiple attempts by him to suppress freedom of speech and action across the country as he tried to come to grips with a nation with festering wounds and no apparent direction. The disillusionment with Bhutto and his brash arrogance made it merely a matter of time before the military usurped power once again. Ironically, Bhutto appointed Zia, who would become his bête noire in the future, as the army chief. Bhutto wanted a chief who would be ethnically incapable of engineering a coup. Zia hailed from the Punjabi Arain clan, which unlike the Punjabis or Rajputs, was not considered a marital race, nor did they have alliances in the clan conscious officer cadre.

[26]However, Bhutto's highhandedness and apparent dismissive attitude towards Zia in the initial years is considered to have been one of the accelerators of the military coup. Bhutto is reported to have declared that

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promoting Zia was the greatest mistake of his life.[27]17. The Zia Epoch. Zia ul Haq was elevated to the office of the Chief of Army Staff by Bhutto, over many other senior generals. He was considered to be pliable, but as history stands testimony, was anything but pliable. The advent of Zia ul Haq saw Pakistan's secular policies replaced by the new Islamic Shariat legal code, which increased religious influences on the civil service and the military. Zia had, perhaps, the most distinct influence on the shape and character of Pakistan's polity in its short history. The Pakistan the world sees today is considered a direct result of his legacy at the helm of the nation. Zia was the force that started the Pakistani military establishment on the road to radicalisation. Zia changed the motto of the Pakistan Army, his creed was Iman, Taqwa, Jihad fi Sabil Allah (Faith, piety and jihad in the name of Alah). [28]A significant contribution made by Zia to the perennial state of flux in Pakistan, was the incorporation of the controversial eighth amendment to the 1973 constitution, which effectively permitted Presidents to function as they pleased, and this has been used multiple times to dismiss governments at will. Zia survived numerous attempts on his life, a large number by a terrorist organisation set up by the late Bhutto's son, Mir Murtaza.[29]Zia had a good run from 1977 to 1988, when he died in a plane crash whilst returning from witnessing a military demonstration. This phase in Pakistani politics saw the President, in the form of Zia wield unlimited powers. The judiciary in Pakistan functioned largely independently during this phase, but was conspicuous by its avoidance of matters political.[30]18. The Second Bhutto and Nawaz Sharif. Benazir Bhutto, daughter of Zulfikar Ali Bhutto, was elected as the first female Prime Minister of Pakistan in 1988. Over the next

decade, she alternated power with Nawaz Sharif, as the country's political and economic situation worsened.[31]From 1988 to 1999, four general elections were held, but none of the governments elected could complete their term as laid down in the Constitution. In each instance the President dismissed and dissolved the national and provincial assemblies on grounds of incompetence and corruption.[32]Benazir was perceived as unable to administer the country and her government was seen as rooted in the quagmire of corruption, including her immediate family. This paved the way for Nawaz Sharif. However, Sharif's style of functioning and governance was considered to be fostering instability, despite his accreditation as the one who led the testing of Pakistan's nuclear bomb, against efforts by the then army chief General Jehangir Karamat. Sharif had a run in with the judiciary as well, in what may be considered a precursor of judicial activism of those days. However, he came up on top in that particular confrontation resulting in the replacement of the Chief Justice with Justice Ajmal Mian, a judge considered close to the Sharif family. History repeated itself when Sharif forced Karamat to retire ahead of time and chose General Pervez Musharraf to succeed him as army chief, considering him to be more pliant than other Generals. Once again the civilian masters chose their own *bête noire* to this all powerful post, a sense of *déjà vu* of the Bhutto Sr and Zia era.

1999 – 2013 – Back to Square One

19. Musharraf – A CEO. Military tensions in the Kargil conflict with India were followed by a coup d'état in which General Pervez Musharraf assumed executive powers in 1999. In 2001, Musharraf named himself President after the resignation of Rafiq Tarar. In the 2002 Parliamentary Elections, Musharraf

transferred executive powers to newly elected Prime Minister Zafarullah Khan Jamali, who was succeeded in the year 2004 by Shaukat Aziz. The next three years witnessed relative political stability, but, the dismissal of Mr Iftikar Chaudhary, the Chief Justice of Pakistan's Supreme Court on 09 July 2007, resulted in a major upheaval in the state of Pakistan. Mr Chaudhary was reinstated on 20 July 2007 following protracted public protests. A few months later, in the face of massive unrest against the government, Musharraf declared emergency in Pakistan on 03 November 2007 and ousted most senior judges of the Supreme Court. This was followed by the National Assembly completing its term on 15 November 2007. A caretaker government was appointed thereafter, with the former Chairman of The Senate, Muhammad Mian Soomro as Prime Minister.[33] This period also saw two ex-prime ministers, Benazir Bhutto and Nawaz Sharif returning from exile and adding to the conundrum of political upheaval. The end result of this sequence of events was the return of democracy in Pakistan, with Musharraf stepping down on 18 August 2008. 20. Pakistan Post Musharraf (2008 – 2013). The assassination of Benazir Bhutto in December 2007 played a role in her party, led by her husband Asif Ali Zardari, win the elections. Yusuf Raza Gilani took on the mantle of Prime Minister and Zardari took over as the President of Pakistan. The National Reconciliation Order (NRO) brought about by Musharraf was declared null and void by the courts and the 1973 Constitution was brought back into force. This phase of Pakistani history witnessed a judiciary, emboldened by its new found power, take the political and executive establishment head on, particularly in matters of corruption. Mr Gilani had to demit office and his successor, the present

incumbent, Mr Raja Ashraf, faces the ignominy of arrest, as ordered by the Supreme Court.

CHAPTER III

THE JUDICIARY IN PAKISTAN

Background

History. The roots of the judicial system in Pakistan date back to the medieval period and have evolved over a long period. The system has evolved over several epochs, which include, the Hindu era, Muslim period including the Mughal dynasty, British colonial period and the period post-independence. The current era, commenced with the partition of India and establishment of Pakistan as a sovereign State.[34]The Federal Court of India, which was established in 1937, was the precursor of the judicial system in force in both Pakistan and India. Post-independence, Pakistan set up its own Federal Court in 1948. Subsequently, the Supreme Court was created under the Constitution of 1956. Since its creation the Supreme Court has retained its jurisdiction through successive legal instruments including the Constitution of 1973. The Constitution of 1956 provided that the Supreme Court shall sit in Karachi and at such other place as the Chief Justice of Pakistan, with the approval of the President, may decide. The Court was housed initially at Karachi but later shifted to Lahore. The 1973 Constitution provided for the permanent seat of the Court at Islamabad, however, due to various financial constraints the courts operated from Rawalpindi till 1993, when it was finally shifted to its current location in Islamabad.[35]The Supreme Court. The Supreme Court of Pakistan is the apex Court exercising original, appellate and advisory jurisdiction. Similar to <https://assignbuster.com/the-democratic-seesaw-law-constitutional-administrative-essay/>

the organisation in India, it is the highest court of appeal and the final arbiter of law and interpretation of the Constitution. The court consists of one Chief Justice and 16 judges.[36]The Chief Justice is appointed by the President of Pakistan, while judges of Supreme are appointed through a Judicial Commission consisting of the Chief Justice, four senior most judges of the Supreme Court, one former Chief Justice or judge of the Supreme Court, the Federal Law Minister and a few other members.[37]Other Courts. In addition to the Supreme Court, Pakistan has Federal Shariat courts and High Courts. There is a High Court in each province and a High Court for the Islamabad Capital Territory. Each High Court consists of a Chief Justice and other judges. The Court supervises and controls all the courts subordinate to it. It appoints its own staff and frames rules of procedure for itself as well as courts subordinate to it. The Shariat Court consists of 8 Muslim Judges including the Chief Justice. Judges of Federal Shariat Court are also appointed through the Judicial Commission. The Court, on its own motion or through petition by a citizen or a government (Federal or provincial), may examine and determine as to whether or not a certain provision of law is in accordance with the injunctions of Islam. Overall, the primacy of issues related to conflict between the civilian government and the military are normally not with these courts and rest largely with the Supreme Court.

The Judicial Stance in Politics

The Judiciary in Pakistan has traditionally been non-confrontationist in its role post-independence. In fact, at times it has indeed upheld the validity of a military coup. Significantly, every military coup in Pakistan, when it happened, was popular with most Pakistanis, including the media, and more

importantly, was legitimised by the Pakistani judiciary.[38]The precedent was set in 1958, following the first instance of usurping of power by the military and has largely followed similar contours till the present decade, when the judiciary gave their first clear indications of political and judicial activism. The First Dictator – Gen Ayub Khan. The military coup in 1958 was, possibly, a striking example of how an apolitical military may be drawn into politics due to the apparent failure of the political system to administer the country. Conditions in Pakistan were severe to say the least, and while the nation suffered the throes of an economic crisis, political parties were unable to find common ground. This led to a large amount of disgruntlement and political confusion. The situation was aggravated in erstwhile East Pakistan, where one Governor and two Chief Ministers were replaced in a matter of just two days. A scuffle in the provincial assembly marked the darkest hour of Pakistan's nascent democracy, when the deputy speaker who was presiding over the house was injured and thereafter died. Moreover, in a matter of a few years Pakistan saw multiple Prime Ministers. Chaudhari Muhammad Ali held the chair from 1955 to 56, followed by Chundrigar for a mere few weeks and thereafter, Malik Firoz Khan Noon in 1957. President Iskandar Mirza was, thus, beset with political problems in 1958 and did not see eye to eye with a succession of Prime Ministers[39]. He issued a proclamation abrogating the constitution and making Gen Ayub Khan the Supreme Commander of the Armed Forces and imposed martial law in the country. This marked the first elevation of a military commander to the head of the state. Gen Ayub Khan permitted the courts to function as normal, but fundamental rights were suspended. Furthermore, the courts could not rule

on or overturn decisions of the military court or the order of the martial law administrator. Given the dire circumstances in the country, it may not have been entirely unimaginable for the courts to support a military coup.

However, no less than the Supreme Court of Pakistan put its stamp of approval on the new regime on 27 October 1958, when the Chief Justice ruled that "... a victorious revolution or a successful coup d'état is an internationally recognised legal method of changing a constitution." This virtually became the stamp of authority for the military regime to rule.

[40]The Judiciary in the Times of Gen Yahya Khan. Gen Ayub Khan ruled Pakistan for more than a decade. During his tenure at the helm of affairs, Pakistan's economy performed exceedingly well in the initial years but lost steam by the end of the decade. Pakistan was also involved in a full-fledged war with India in 1965. However, by 1968 there was widespread and popular unrest and protests across the nation demanding return to civilian rule. To add to his woes, Ayub Khan fell seriously ill and though he recovered from the illness, he could not find the old spirit in himself. He made an attempt to make a graceful exit, by promising to hold elections and hand over control to a civilian elected government. However, he was second guessed by his own protégé and then army chief Gen Yahya Khan, who usurped power in a bloodless coup which did not even involve troops. This was largely due to Gen Ayub Khan's willingness to read the writing on the wall and acquiesce to step down in favour of martial law, administered by Yahya Khan.[41]There was no reaction or response from the judiciary at this change over of power, as it was simply a change of the horseman with the horse remaining the same.[42]Judiciary and Civilian Rule – Zulfikar Bhutto, 1971. The 1971 war

saw the dismemberment of Pakistan and the birth of Bangladesh. The defeat saw Yahya Khan tendering his resignation and handing over power to Zulfikar Ali Bhutto, the chairman of the Pakistan People's Party, as the party had won the largest number of seats in the national assembly.[43] Though this was technically the first democratically elected government of Pakistan, it soon degenerated into a personalised dictatorship, in short democratic traditions and political institutions were not permitted to grow. This led to widespread angst amongst the people of Pakistan, evident through widespread protests across the country. The clamour for Bhutto's resignation reached a crescendo in 1977 and he had to call out the army to retain control. This would prove to be his undoing as well, because, Gen Zia ul Haq, who had ironically been chosen by Bhutto himself over a number of generals senior to him in service, executed a smooth coup and usurped power. The military was, thus, back in power in Pakistan. The judiciary played a different kind of role in this entire episode. Bhutto was charged with murder, among other crimes. Bhutto's Hanging. After being removed from office Bhutto was initially tried by the Lahore High Court, where his case was presided over by a judge who had been superseded twice under Bhutto's orders. The Lahore court heard his case despite an objection against the said judge and Bhutto was awarded the death penalty. Bhutto appealed to the Supreme Court where his case was heard by a seven judge bench, including the Chief Justice. Significantly, the Chief Justice Sheikh Anwarul Haq had replaced the original incumbent Yaqub Ali only after Nusrat Bhutto, Bhutto's wife had moved a writ petition on behalf of her husband. Moreover, Anwarul Haq also held the office of acting president when Zia was out of the country.

Consequently, Bhutto objected against the Chief Justice as well, but the motion was overruled. The bench upheld the conviction by a four is to three majority. Bhutto was hanged in a secret operation on 04 April 1979, ending a volatile and turbulent career which oscillated between extremes.[44]The Silent Judiciary - Zia. The tenure of Zia ul Haq as President of Pakistan witnessed the judiciary continuing 'business as usual' and it is a commentary on Zia's perceived power that no major judicial action or decision against either him or his regime came from the courts. This was possibly the most silent era of the Pakistani judiciary. Zia also made attempts to change the 1973 Constitution and consequently brought about multiple amendments to the same. These amendments were largely aimed at providing greater powers to the army in general, and the President in particular. The changes also envisaged an constitutional role, providing the army a say in decision making in the country, as Zia was of the view that "such provisions were essential in an ideological state like Pakistan".

[45]Judicial Decisions in Democratic Pakistan. The sudden and mysterious demise of Zia in a plane crash brought Gen Aslam Beg to the chair of army chief and he preferred to hand power back to the elected representatives, which saw Benazir Bhutto assuming office in Dec 1988. She was, however, summarily dismissed from office by President Ghulam Ishaq Khan under the eighth amendment for corruption and a long list of other charges. This paved the way for Nawaz Sharif to take up the office of Prime Minister. However, his honeymoon with Ghulam Ishaq Khan did not last for more than a couple of years. Nawaz Sharif's government was sacked by the President in 1993 and an interim government put in place. Sharif filed a petition in the Supreme

Court against the dissolution of the assembly and his removal, as he and his alliance held a two thirds majority in the house. A ten judge bench of the Supreme Court ruled the President's actions unlawful and ruled on various aspects of the formal relationship between the president and the prime minister. This was, possibly, the first instance of the judiciary providing clear direction or playing a positive role in the political affairs of Pakistan.

However, this action could not be termed 'activist' by any stretch of imagination as this was not done through suo moto notice, but rather on the basis on a formal petition filed by a citizen, in this case Nawaz Sharif.

[46]Benazir - Attempted Politicisation of the Judiciary. The next elections in Pakistan, once again brought the Pakistan People's Party and Benazir to power, albeit with a slim majority. This was soon followed by the election of Mr Leghari, a PPP loyalist as the President. It is perceived that the PPP government succeeded in politicizing the judiciary and curtailing its independence during this period. A case in point was the appointment of the Chief Justice of the Supreme Court. Following normal practice, when Dr. Nasim Hasan Shah, the incumbent, retired as Chief Justice, Justice Sa'ad Saud Jan should have been elevated to the post. However, this was not to be, as he was superseded by Justice Sajjad Ali Shah, who ranked third in seniority. A United States 1995 Human Rights Report on Pakistan described the judiciary as "not independent in reality." The part of the report on independence of judiciary was blunt and hard-hitting as it gave details of how the courts were influenced. "The Constitution provides for an independent judiciary but in reality, however, the judiciary is not independent." The report indicated that, "It has become a standard practice

to appoint judges to the High Courts and Supreme Court on temporary basis for a period of one year and later confirm or terminate their appointments after an evaluation of their performance. Legal experts say that temporary judges, eager to be confirmed following their probationary period, tend to favor the government's case in their deliberations. Judges in the Special Terrorism Courts are retired jurists, who are hired on renewable contracts. The desire to maintain their positions has the potential to influence their decisions."^[47]Nawaz Sharif and the Judiciary. Nawaz Sharif followed Benazir Bhutto in power and continued the attempts to control the judiciary, as the previous government had done. He entered into a verbal sparring match with both the Supreme Court as well as President Leghari, who sided with the courts. This led to a clash between Sharif and the Chief Justice Sajjad Ali Shah, who had to retire and was replaced by Ajmal Mian, who was considered close to the Sharif family.^[48]This was, thus, the end result of a minor attempt at judicial review, and it was nowhere near what could be termed as judicial activism. However, the politicians brooked no conflict and took swift and positive action to establish their supremacy. The military remained clear of the entire issue in both instances.

Analysis

Judiciary and Dictators. The Pakistani judiciary had, traditionally and historically, been circumspect about taking on military rulers. This has been in evidence through all phases of military rule till 2007. It may be safe to say that all political, financial as well as, judicial power rested with the military commanders. The Supreme Court had even gone so far as to assess and pass a ruling indicating that a military coup is indeed a legal means of

removing a government or replacing one. However, in non-political matters the judiciary seems to have functioned independently through all eras. Judiciary and Civilian Rulers. The courts have been harsh and matter of fact with all civilian, elected rulers of Pakistan. From the hanging of Bhutto to indicting political leaders of all hues, for corruption, the courts have displayed relative independence in matters dealing with elected representatives, which is in complete contrast to their actions concerning the military. This is, possibly, evidentiary of the clout of the military.

CHAPTER IV

JUDICIAL ACTIVISM

Background

Origins. The term "judicial activism," was coined by Arthur Schlesinger in 1947. However, over the past few decades, the term "judicial activism" has become an immensely popular tool for criticizing judges' behaviour. Despite the term's prominence, however, its meaning is obscure, and its origins have been forgotten.[49]A Westlaw search revealed that the terms "judicial activist" and "judicial activism" appeared in 3, 815 law review articles during the 1990s and in 1, 817 more articles between 2000 and 2004.[50]Definition. Broadly, the term Activism flows from the term activist, which may be broadly defined as 'a person adopting a policy of vigorous action in politics'. [51]Further, judicial activism is defined as 'judicial rulings suspected of being based on personal or political considerations rather than on existing law'. [52]It is also defined as the willingness of a court to create policy by interpreting laws broadly rather than strictly.[53]

The Global Experience

Instances of Judicial Activism. Modern history is replete with examples of judicial decisions that have been described as activist. Some of these may have played a role in changing the course of world history itself. This includes activism resulting in the election of a President of the United States of America (USA), who went to war in Iraq and also started the global war on terror. Others are restricted to individual nations and have had an effect on the administration, ideologies and in some cases beliefs in those nations. For instance, a 1973 court ruling in the USA made the option of abortion a right for its citizens, which was thus far a subject of heated and emotional debate transgressing into the bounds of religion apart from politics. The United States of America. One of the more famous instances quoted or alleged to be activist was the famous George Bush Vs Al Gore case in the Supreme Court of the United States of America. The election was an excruciatingly close one between the two candidates and the result boiled down to the outcome from Florida. Unfortunately, there was a pervasive uncertainty about the results of the election in Florida. George Bush was leading by a wafer thin margin of a mere five hundred and thirty-seven votes out of nearly six million votes cast. As a consequence of the narrow margin, the Florida courts, interpreting Florida election law, ordered a state-wide recount. However, the Supreme Court issued a stay on the recount and as a result George Bush was declared elected for a second term.[54]India. India, too, has witnessed judicial activism to a certain extent. This is largely attributed to the courts taking frequent suo moto cognizance of issues relevant to the larger populace of the country and the propensity of the increasingly aware citizenry to file

Public Interest Litigations (PIL). One erstwhile Chief Justice of the Supreme Court has succinctly put forth a view that judicial activism is actually 'judicial review' and is essential for the survival of democracy in India as we know it.[55] Another eminent retired Chief Justice has propounded that " in the last few years the Supreme Court has, through intense judicial activism, become a symbol of hope for the people of India. It has augmented its moral authority and acquired a new credibility with the people through judicial activism and judicial creativity." [56] Instances of Judicial Activism in India. Despite the above pronouncement from an erstwhile Chief Justice of the Supreme Court, in recent times, the Supreme Court has taken up issues not directly linked to Fundamental Rights of citizens and passed various directives. These include, interlinking rivers in India, which is an engineering and financial nightmare for any government. The Court has also passed orders banning the pasting of black film on automobile windows. On its own, the Court also took notice of Baba Ramdev being forcibly evicted from the Ramlila grounds by the Delhi Administration and censured it. The Court has ordered the exclusion of tourists in the core area of tiger reserves. All these managerial exercises by the Court are hung on the dubious jurisdictional peg of enforcing Fundamental Rights under Article 32 of the Constitution. In reality, no such rights of individuals or any legal issues are at all involved in such cases. The Court is only moved for better governance and administration, which does not involve the exercise of any proper judicial function.[57] The Indian Judicial View. Whilst debates about the pros and cons of judicial activism in India rage, the Supreme Court itself has been quite forthright and specific on the issue of activism in the judiciary. A two judge

bench of the Supreme Court, whilst ruling on a PIL in this regard have put the following on record:-" We hasten to add that it is not our opinion that judges should never be 'activist'. Sometimes judicial activism is a useful adjunct to democracy such as in the School Segregation and Human Rights decisions of the US Supreme Court vide *Brown vs Board of Education*, *Miranda vs Arizona*, *Roe vs Wade* etc. or the decisions of our own Supreme Court which expanded the scope of Articles 14 and 21 of the Constitution. This, however, should be resorted to only in exceptional circumstances when the situation forcefully demands it in the interest of the nation or the poorer and weaker sections of society, but always keeping in mind that ordinarily the task of legislation or administrative decisions is for the legislature and the executive and not for the judiciary".[58]Europe. The European Court of Justice in a ruling set aside a co-operative framework prescribing criminal penalties for environmental offences, as agreed among member states of the European Union (EU). The court did so on the grounds that only the EU legislature had the ability to take such action. It reached this conclusion despite an absence of general competence of the legislature to set criminal penalties and in the teeth of a provision in the EU Treaty which expressly confers authority for member states to co-operate in criminal matters. This was considered a case of judicial over-reach, as it raised a question mark over the authority of member states to enter into agreements or treaties.[59]

Analysis

Why Democracy Survives? Despite multiple instances of perceived judicial over-reach or activism, democracy still survives in the USA, Europe as well as India. This may be attributed to reasons including, but not limited to, the

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following:-The pluralistic nature of the societies in question plays a major role in the stability of these countries. The effective and constitutional control exercised by democratically elected representatives over the armed forces of these countries ensures that the military remains a tool or instrument of national policy rather than becoming the institution dictating policy. Economic and political stability, despite common issues of corruption, burgeoning populations, their resident expectations and political posturing, play a vital role in ensuring the survival of democracy. The social fabric of these countries goes beyond narrow parochial attitudes based on a single issue, e. g. the very existence of Pakistan is based on opposition to India. The existence of a vibrant and viable Constitution, which does not face dismemberment at the whims and fancies of individuals. Militaries in these countries have avoided the pitfall of radicalisation, which provides them with a wider perspective of national and international affairs.