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[www.advancelrf.org](http://www.advancelrf.org)**Constitutionalism and Judicialization of Politics in Pakistan****Muhammad Fahd Amin**

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Email: [mfahdamin@qau.edu.pk](mailto:mfahdamin@qau.edu.pk)**Abstract**

*In the present day and age, almost every state function under the rules prescribed by its constitutional law. The government can exercise its power within the bounds of law and Constitution. The concept of constitutionalism is based on an elaborate system of checks and balances which prevents government from abusing its power. This whole theory places a huge responsibility on judiciary to examine the legality of governmental actions in the light of constitutional provisions. However, this power of judiciary is circumscribed by the constitutional design and is never meant to give unbridled powers to the judiciary. However, judicialization of politics has surfaced as a main manifestation of this judicial power. It has been observed that the judiciary sometimes take away constitutional role of other two branches by exercising its power in political matters. The constitutional design of Pakistan also gives power to judiciary to evaluate the constitutionality of laws and executive actions. However, the constitutional jurisprudence of the country makes it clear that a gradual expansion of judicial power has taken place through the instrument of judicial review. The adjudication of political matters by the apex court has resulted in various constitutional anomalies. This article explores the relationship of constitutionalism with judicialization of politics in Pakistan.*

**Keywords:** Constitutionalism, Judicial Review, Judicial Activism, Politics, Rule of Law, Constitutional Democracy, Judicialization of Politics, Checks and Balances

**Introduction**

The phenomenon of constitutionalism entails limits on exercise of political power. Constitutionalism acts as a bulwark against arbitrary exercise of public authority and serves to safeguard rights of the citizens. This doctrine of constitutionalism has been defined in numerous ways by different scholars. However, constitutionalism signifies a legal limitation on government (McIlwain, 1947). Such legal limitation is imposed upon the government in a variety of constitutional means including division of powers, system of checks and entrenchment of basic rights in a constitutional document (Sajo and Uitz, 2017). Thus, constitutionalism protects individual rights against tyranny of majority and seeks to establish an accountable government.

Separation of powers is the hallmark of modern constitutionalism. This idea encompasses a diffusion of state powers in judiciary, executive and legislature. Usually, a written constitution prescribes the mandate of each branch of government. To some experts, a functioning democracy is defined by the principle of separation of powers among governmental branches (Kavanagh, 2016). This facet of constitutionalism necessarily provides an oversight role to judiciary. This oversight is manifested through constitutional review of legislative or administrative actions. According to some

commentators, judicial review plays two important roles in a constitutional democracy; firstly, the courts through judicial review ensure that the legislature or executive do not overstep their constitutional domain and protect rights of citizens; and secondly, judicial review enables citizens to raise their grievances at an appropriate forum (Eylon and Harel, 2006). Thus, courts play an important function in a constitutional dispensation by keeping a constant check upon the public actions of legislature and executive authorities. As a corollary to this function, any individual who is aggrieved from a legislative or an administrative action of the state can always challenge it in a constitutional court. The idea behind judicial review is that unlike legislatures which are prone to political pressures, the courts are in a better position to safeguard individual rights of the citizens.

However, it would be wrong to assume that this development in the area of constitutionalism has received validation from all and sundry. In fact, there is a growing scholarship on the ills of expanded judicial power and undemocratic nature of judicial review. There is a general observation among the critics of judicial review that by reviewing a legislation, courts effectively deprive citizens of governing themselves (Waldron, 2006). In fact, these critics have accentuated upon the political origin and nature of the constitution rather than treating it as a mere juridical instrument. In response to the expanded judicial powers in form of constitutional reviews, the sceptics have coined a new theory of constitutionalism which is termed as political constitutionalism. This idea of political constitutionalism is premised upon virtues like non-domination, equality, popular sovereignty and open government (Skinner, 1998). Unlike, the general form of constitutionalism (often defined as legal constitutionalism), the political constitutionalism highlights the importance of democratic politics based on equality of concern and respect for each citizen. As per the proponents of this school of thought, it addresses the legitimacy concerns that undermine the democratic credentials of judicial review.

It is pertinent to observe that there has been an astronomical increase in judicial powers under the aegis of constitutionalism. By invoking their constitutional jurisdiction, courts in numerous jurisdictions have asserted their sphere of influence and clout in areas which strictly fall within the domain of either the executive or the legislature. Thus, new constitutionalism has ushered a new era where unprecedented amount of powers has been transferred from representative bodies to judiciary (Hirschl, 2004). Just like other jurisdictions, the phenomenon of constitutionalism in Pakistan offers unique insights into the causes of significant increase in judicial powers. Another important aspect which is a direct consequence of constitutionalism is judicialization of politics in numerous democratic states. Vallinder states that judicialization of politics convey either, “(1) the expansion of the province of the courts at the expense of politicians and/or administrators, or, (2) the spread of judicial decision-making methods outside the judicial province proper” (Vallinder, 1992, p.91). Thus, it is judicial interference in the functioning of other branches of government. However, judicialization of politics encompasses a wide array of possibilities for judicial interference including interference in the executive decision making and deciding upon the legitimacy of regimes.

It has been argued that judicialization of politics occurs at three levels: Firstly, courts have increasingly placed substantive limits on the legislative powers of parliamentary/elected bodies; Secondly, courts have a tendency to step in the formulation of substantive policies; and finally, courts have been instrumental in shaping and changing the political activity (Ferejohn, 2002). Thus, courts have assumed a special role in the constitutional polity and factually this wave of judicial activism has swept away the much-cherished norm of separation of powers in the government branches. From the debate, judicialization of politics is not merely connected to purely political conundrums rather it also involves questions of executive or legislative policies. However, the main thrust of this article is to explore judicial interference in purely political matters. Hirschl terms this phenomenon as “judicialization of pure politics”. This judicialization signifies court’s decisive role in outright political matters which include determining legitimacy of a regime and collective

identity questions of a polity (Hirschl, 2006). Like many other jurisdictions, there has been a gradual increase in powers of the apex court of Pakistan. The phenomenon of judicialization of politics is all too evident in the country. On numerous occasions the apex court has decided upon the question of legitimacy of regimes. Furthermore, in the more recent past, numerous verdicts have disqualified members of parliament, including two Prime Ministers. The interference of courts in political fray has attracted a lot of criticism on the conception of constitutionalism in the country. The political class has often seen this judicial activism as a direct affront to democracy and representative politics. This article explores the major instances of judicialization of politics in Pakistan. The article also aims to explain about increase in power of judiciary under aegis of the cherished principles of constitutionalism.

### **Constitutionalism in Pakistan—Scramble for Power among State Institutions**

The most common connotation associated with constitutionalism is presence of a constitutional design that prevents abuse of governmental powers. Most written constitutions of the world specifically enshrine bill of rights which provides security to rights of citizens and lays down a comprehensive system of checks and balances which would deter the government or the legislative body from enforcing laws and policies that are prejudicial to any segment of society. In such a constitutional setting, judicial branch has a very important role in ensuring that the rights of people are safeguarded.

The phenomena of constitutionalism in Pakistan has been marred by unconstitutional actions of the executive branch of government. Since its inception, the constitutional democracy could not take root in the country. Consequently, the role of legislature has been consistently undermined in the power struggle among the branches of government. The whole idea of constitutionalism is premised upon the assumption that whenever there is an abuse of power by the executive or the legislative branch, it is incumbent upon judiciary to place restraints on such abuse of power. However, the record of apex court of Pakistan in preventing this abuse of power is not encouraging.

### **Manifestations of Judicialization of Politics in Pakistan**

Judicialization of politics is not a new phenomenon in Pakistan. Throughout its history, the political landscape of the country has been reshaped as a result of verdicts of superior judiciary. From legitimizing military regimes to disqualifying Prime Ministers, from dissolving legislatures to almost rewriting the constitution, the judicial branch has always asserted its dominance as a key player in the political dispensation of the country. It would not be wrong to assume that the sporadic constitutional crises that have stopped constitutionalism from taking root have also been spurred by some decisions of the superior judiciary. That is why the constitutionalism in Pakistan is also described as ‘unstable constitutionalism’ by some experts (Tushnet & Khosla, 2015). As mentioned earlier, the term ‘judicialization of politics’ carries a number of meanings. In context of Pakistan, this term has manifested in the following forms:

### **Validation of Unconstitutional Regimes**

The concept of constitutionalism is closely linked with limited government. This essentially implies that constitutionalism is premised upon a thorough system of checks and balances on powers of government. Any unlawful exercise of power by public officials is subject to scrutiny and review of courts. Thus, it can be said that judiciary acts to prevent misuse of power by executive authorities or the legislative branch. However, a glance at the constitutional jurisprudence shows that record of courts in enforcing the Constitution is far from perfect. On numerous occasions, the superior judiciary has validated the unconstitutional actions of various regimes. This is one of the main causes of fragile constitutionalism in the country. This has a direct nexus with judicialization of

politics in the country as judicial verdicts have served to legitimize certain unconstitutional regimes. Therefore, it would be important to explore this aspect of judicial involvement.

### **Dosso Case**

The superior judiciary faced an important predicament when the first Constitution of Pakistan was abrogated by the President in 1958. This development provided judiciary with an opportunity to strengthen constitutionalism by striking down an unconstitutional proclamation of the President. However, in an important constitutional case (*State v Dosso*, 1958) the Court gave validation to the martial law and ruled that the abrogated Constitution no longer served as the fundamental law of the land (Stavsky, 1983). Superior judiciary justified the abrogation of the Constitution by holding that an efficacious coup d'état was an acknowledged way of altering the constitution (Khan, 2017). This was a retrogressive judgment in context of constitutionalism, as the judicial branch validated an unconstitutional action of the President. This judgment laid the groundwork for the validation of future unconstitutional actions of the executive branch.

### **Nusrat Bhutto Case**

Another seminal moment in the constitutional jurisprudence of Pakistan came, when the imposition of martial law in 1977 was challenged before the apex (*Begum Nusrat Bhutto v. Chief of Army Staff and Federation of Pakistan*, 1977). The new military regime had suspended constitutional order and promulgated Laws (Continuance in Force) Order. Legality of the seizure of power was questioned in Nusrat Bhutto Case. Once again a question having political ramifications was placed for judicial determination. Furthermore, the Court again had an opportunity to fortify the constitutional democracy in the country and defy an unconstitutional regime change. In addition to that, the petitioner used an earlier precedent (*Asma Jilani v Government of the Punjab*, 1972) for reiterating that military regime had no right to declare martial law (Phillips, 1979). However, Court refused to entertain the petition and held that there was a real threat to public order due to political upheaval in the country and the circumstances warranted military intervention (Cheema, 2018). Moreover, the military regime was granted limitless powers to amend the Constitution. This judgment runs counter the essence of constitutionalism as it empowered one individual to run the country according to his whims and fancies. The judicial branch was supposed to establish rule of law in the country, but it sided with a regime that violated the Constitution. Apparently, the Court sought to build a collaborative relationship with the new regime and thus gave it legitimacy (Kureshi, 2021). Justification of extra-constitutional actions by the superior judiciary added to fragility of an already weak constitutional order.

### **Zafar Ali Shah Case**

A democratically elected government was once again toppled through a military action in 1999. Following the usual modus operandi, the Constitution was suspended and promulgated interim constitutional order for running administration of the State. This matter was challenged before the apex court. Nevertheless, once again this extra-constitutional action was validated by the court. It is pertinent to note that an unconstitutional regime cannot function without legitimacy and when judiciary provides legitimacy to such regimes it seriously damages the democratic order and constitutionalism in the country.

### **Arbitrary Jurisprudence on Dissolution of Governments**

The constitutional jurisprudence of Pakistan shows that the notion of constitutionalism could not take root due to arbitrary decision making by the superior judiciary. A key aspect in this regard is the fragility attached to democratically elected legislatures in Pakistan. Ironically, the country held its first national elections after twenty-three years of its creation. The political disruptions coupled

with retrogressive judicial decisions weakened the democratic order in the country. Judicialization of politics is all too evident in the way the judicial branch has exercised its powers in adjudicating upon the fates of elected governments in Pakistan. Dissolution of legislatures have time and again been questioned before the courts and the jurisprudence in these cases has been inconsistent. The decisions on dissolutions of governments in Pakistan offers a valuable discernment vis-à-vis the phenomenon of judicialization of politics.

### **Dissolution of the Initial Constituent Assembly— Tamizuddin Case**

Historically, unaccountable executive overreach has undermined the role and functioning of the legislative branch of the government. The abuse of state power is a key reason for the fragility of democratic order in the country. Constitutionalism requires court to judge upon the legality of executive actions and avert abuse of public power by executive authorities or the legislature. Nevertheless, the historical evidence shows that courts have often given legitimacy to the unlawful executive actions.

Constituent Assembly was primary legislative and constitution-making body of Pakistan. However, before it could complete its task, it was dissolved by Governor General on the pretext that the Assembly no longer enjoyed the confidence of people (Khan, 2009). This action created an air of uncertainty and laid groundwork for weak representative institutions (Choudhury, 1956). A petition was filed in Sindh Chief Court by President of dissolved Assembly. The petitioner asked the court to restrain government from interfering with the powers of President of Assembly. The Chief Court declared that the dissolution of Assembly by the Governor General was ultra vires to the Indian Independence Act, 1947 (Moulvi Tamizuddin v. The Federation of Pakistan, 1955). This decision was challenged in the Federal Court by the Federation.

At the appellate forum the decision of the Chief Court of Sindh was overturned by the Federal Court on a technical ground. The Court maintained that as the provision granting writ jurisdiction to the High Courts did not receive the assent of Governor General, it could not be deemed as a valid enactment (Khan, 2009). This essentially meant that High Court could not take cognizance of the matter and the dissolution of Assembly cannot be questioned. The Federal Court did not touch the issue as to the validity of the dissolution of Assembly. This decision defined constitutionalism as limit on legislature and provided foundations for supremacy of executive (Newberg, 1995). It was indeed a novel definition of constitutionalism by the superior judiciary and laid groundwork for an unstable constitutional polity. Furthermore, this decision led to nullification of numerous laws that were without the assent of Governor General.

### **Dismissal of Junejo Government—Haji Muhammad Saifullah Khan Case**

General Zia's military regime changed the constitutional design of Pakistan. As mentioned before, the Supreme Court in Nusrat Bhutto case provided permission to military government to alter the Constitution. The regime took full advantage of this decision and altered the Constitution of 1973. One the major change pertained to the insertion of Article 58(2)(b) in the Constitution. This provision gave powers to President to unilaterally dissolve Assemblies. The original Constitution enshrined a parliamentary system of government which enshrined a ceremonial role for the President. However, the military regime transformed the constitutional design into a semi-presidential system of government. This provision has been used to destabilize elected governments of the country (Akhtar, 2009). The contradictory jurisprudence on exercise of this power provides an account of the state of judicialization of politics in Pakistan.

Presidential power to dissolve legislature was first exercised for in 1988, when legislature was disbanded by President. This Presidential action was first questioned before the Lahore High Court.

The High Court held that the Constitution did not envisage such arbitrary discretion of President and declared it an unlawful order (*Muhammad Sharif v Federation of Pakistan*, 1988). However, the Court refused to reinstate the dissolved legislature and the Cabinet.

An appeal was brought against this judgment in the Supreme Court (*Federation of Pakistan v. Haji Muhammad Saifullah Khan*, 1988). It was held by the Court that the Presidential power to dissolve the Assembly could be scrutinized under judicial review and this power had to be exercised reasonably and fairly (Khan, 2009). After considering the circumstances and facts surrounding the dissolution of Assembly, the apex court held that order of President was not lawful. However, just like the Lahore High Court, the apex Court refused to reinstate the Assembly.

### **Dismissal of First Benazir Government—Tariq Rahim Case**

In 1990, Article 58(2)(b) was once more used to dissolve the National Assembly leading to removal of Benazir Bhutto's government. The charges against the administration included insufficient legislative work, willful obstruction in working of constitutional arrangements, corruption and violation of Constitution by government. This Presidential Order was first challenged in Lahore High Court. The Lahore High Court refused to negate the Presidential order and held that government could not function in accordance with the constitutional mandate and it was imperative to hold fresh elections (Khan, 2009).

Consequently, this decision was challenged in Supreme Court (*Khawaja Ahmad Tariq Rahim v. the Federation of Pakistan*, 1992). It was held that material produced by federation and the attending circumstances justified the order of dissolution. It is pertinent to note that the 'test' laid down for invoking Article 58(2)(b) was an "actual or imminent breakdown of constitutional machinery." The Court chose an altogether different interpretative approach than the one it adopted in *Haji Muhammad Saifullah* case. This new interpretation provided expansive authority to President vis-à-vis dissolution of legislature (Siddique, 2006). Deviation from an earlier precedent goes to show that judiciary chose to shift goal-posts when it came to deal with specific political governments.

### **Dismissal of Nawaz Government—Nawaz Sharif Case**

In 1993, legislature was dissolved, and government of Nawaz Sharif was thereby dismissed. Like the previous occasion, the President invoked Article 58(2)(b) to dissolve the legislature. The grounds taken by the President for exercising his power included, mass resignations by the legislators, maladministration and corruption, persecution of political opponents and constitutional violations (Khan, 2009). Contrary to earlier examples, the petitioner in this case invoked the original jurisdiction of the apex court while challenging the presidential order (*Muhammad Nawaz Sharif v. the President of Pakistan*, 1993). Again, superior judiciary was called upon to examine the fate of a political government. In its judgment, the apex court declared that the Presidential order was not sustainable under the constitutional scheme and resultantly the legislature and government was restored. Intriguingly, the Court chose to ignore the standard set by it in *Ahmad Tariq* case and reverted to applying the ratio of *Haji Muhammad Saifullah* case (Siddique, 2006). The highest court of the country determined that presidential power to dissolve legislature was an extraordinary power which could only be employed under exceptional circumstances. The inconsistent judicial decision making goes to show as to how judicialization of politics has undermined the constitutional democracy in the country. This whole situation indicates that the Court adopted different standards for deciding two highly important political cases. The fledgling democracy in the country suffered due to this strand of judicialization of politics.

## **Limiting the Constituent Power of the Parliament**

The phenomenon of judicialization of politics largely rests upon court's interpretation of constitutional provisions. Whenever courts have decided important legal questions having political overtones, they performed this task by interpreting various provisions of the Constitution. With global expansion in judicial power, the apex Court of Pakistan has relied upon its original jurisdiction to redefine the domains of legislature and the executive. In relation to this issue, the superior judiciary has not shied away from scrutinizing the constitutional amendments passed by the legislature. This jurisprudence is linked to doctrine of basic structure which developed in India in (*Kesavananda Bharati v. State of Kerala, 1973*) which placed substantive and procedural limits on amending the constitution (*Krishnaswamy, 2011*). Though the Pakistani apex court does not expressly acknowledge the relevance of this doctrine in Pakistan, the judicial decisions show that the doctrine has been incorporated in constitutional edifice of the country. The apex court uses the term "salient features of the Constitution" to refer the unamendable characteristics of Constitution. However, constitutional jurisprudence regarding restriction on constituent power of the legislature is inconsistent. The salient features doctrine emerged out of political cases; therefore, it would be necessary to analyze the relevant cases:

### **Mahmood Achakzai Case**

Under the Eight Constitutional Amendment the office of President became quite powerful and the President could even dissolve the National Assembly at his will. Petitioners challenged this Amendment on the ground that constitutional amendment was contrary to theory of basic structure as enshrined in Objectives Resolution (*Mahmood Khan Achakzai v. Federation of Pakistan, 1997*). In its decision, the Court upheld the constitutionality of this constitutional amendment but acknowledged importance of doctrine of basic structure. For the first time, the Court identified federal and parliamentary form of government blended with Islamic provisions as the basic structure of the Constitution (*Khan, 2017*).

### **Zafar Ali Shah Case—Court Reiterates Basic Structure Doctrine**

In this case, though the superior judiciary validated coup d'état and provided legitimacy to military regime, it specifically prohibited the new regime from making any amendment in the "salient features of constitution". Those salient features included independence of judiciary, parliamentary system of government blended with Islamic provisions and federalism (*Zafar Ali Shah v. General Pervez Musharraf, 2000*).

### **Pakistan Lawyers Forum Case—Supreme Court Abandons Basic Structure Doctrine**

Numerous amendments were made in Constitution under Seventeenth constitutional amendment. Since the said constitutional amendment was also passed under the aegis of a military regime, it was questioned before the apex court. One of the main thrusts of the petitioners was that the Amendment had violated basic structure of Constitution (*Pakistan Lawyers Forum v Federation of Pakistan, 2005*). Interestingly, it was held that superior judiciary had no jurisdiction to strike down provisions which violated the salient features of Constitution. Furthermore, it was stated that the theory of basic structure has only been used to recognize the basic structure or salient features of the Constitution.

### **Rawalpindi District Bar Association Case—Apex court has the final say on examining the constitutionality of constitutional amendments**

The Rawalpindi District Bar Association case (*Rawalpindi District Bar Association v. Federation of Pakistan, 2015*) established the doctrine of basic structure as an important constitutional prerequisite

for examining the vires of amendments made to the constitution. For the first time, it was laid down that there are substantive implied limits on the power of Parliament vis-à-vis amendment to constitution (Roznai, 2017). The decision provided that even though constitutional text expressly ousts the jurisdiction of the courts to question the constitutional amendments, the courts can still question the constitutionality of such amendments on touchstone of 'salient features' of the constitution and even strike down an amendment that is not in line with such salient features. The minority opinion in this case offers valuable insights into the dangers of limiting powers of the legislature by basic structure doctrine. It acknowledged that the constitution did not place any express or implied limitation on the authority of Parliament vis-à-vis constitutional amendments. This opinion clearly maintained that judicial scrutiny of constitutional amendments goes against the democratic principles and would undermine the legislative branch of government.

The above-mentioned cases demonstrate that judicialization of politics not merely affect the political landscape of the country but also redefines the power equation among the branches of government. The application of theory of basic structure in decisions of the apex court demonstrates gradual increase in judicial power and a relative decrease in the role of legislative powers of Parliament. Presently, the Court has the final say regarding the substance of constitutional amendments. Consequently, the constituent power of legislature has considerably diminished.

### **Disqualification of Prime Ministers—Judicialization of politics at its zenith**

Perhaps the best example of enlargement of power of judicial branch can be seen in the way in which the apex court disqualified two Prime Ministers from the office. It can be observed that the judicialization of politics has resulted in an unrestrained power of the superior judiciary to remove the head of the executive branch. Of course, some experts hail this development in context of establishing rule of law in the country. However, critics of this concentration of judicial power see such extreme actions as usurpation of executive powers by the court and consider these actions contrary to the fundamentals of a democratic polity. It is thus important to examine the jurisprudence related to the disqualification of Prime Ministers.

### **Disqualification of Yousaf Raza Gillani**

The constitutional democracy in Pakistan has never taken root due to weak elected institutions. Since the much trumpeted 'lawyers' movement' that culminated in reinstatement of Chief Justice Iftikhar Muhammad Chaudhary, the judicial branch started asserting its power with a new vigor. This rise in judicial power created several constitutional anomalies which ultimately culminated in a weak democratic dispensation in the country. In this regard, the proceedings resulting in disqualification of Prime Minister Yousaf Raza Gillani offer useful insight.

The highest court of the country found the executive head of the country guilty of contempt of court when he refused to implement the order of court in (*Dr. Mobashir Hassan v Federation of Pakistan*, 2010). A brief background of this contempt proceedings was that when the apex Court struck down the National Reconciliation Ordinance 2007, it ordered the executive branch to revive the criminal investigations into the alleged corruption cases that were closed due to the said legislation (*Muhammad Azhar Siddique v. Federation of Pakistan etc.*, 2012). Under the National Reconciliation Ordinance, 2007 numerous criminal charges were dropped against several politicians including Asif Zardari who became President of Pakistan in 2008. Executive branch was reluctant to comply with the order of the Supreme Court because Prime Minister considered that President enjoyed constitutional immunity against the alleged criminal charges during the term of his office (Boone, 2012). Consequently, the Supreme Court held the Prime Minister guilty of contempt of court because of his failure to comply with the directions of the Court.



Though declaring an elected Prime Minister of being guilty of contempt of court was an extreme step. In its order the Court did not determine that the court conviction would automatically disqualify the Prime Minister from holding his seat as a parliamentarian (Hussain, 2018). The constitutional framework provided this power to the Speaker of National Assembly to initiate disqualification proceedings against an elected member of Assembly. Furthermore, constitutional provisions also empower Election Commission to investigate the grounds of disqualification of a member after his case is forwarded to the Commission by the Speaker.

There was a categorical refusal by the Speaker to send a reference for disqualification of Prime Minister to Election Commission on the ground that no question of disqualification arose in the proceedings of the court (Ghauri, 2012). However, the Supreme Court intervened again and declared the disqualification of Yousaf Raza Gillani for a period of five years from office (Hussain, 2018). Some commentators saw termed this development as a judicial coup (Waseem, 2012). Many critics believe that this judgment set a dangerous trajectory for the democratic future of the country as it gave unlimited power to unelected judges to remove elected Prime Ministers from office.

### **Disqualification of Nawaz Sharif—Panamagate Proceedings**

The disqualification of Gillani marked the beginning of judicial hegemony over the highest executive office. The decision hung a sword of Damocles over every successive Prime Minister. This judicial power was again displayed when the apex Court disqualified Nawaz Sharif from office in 2017. The whole saga began with the leak of Panama Papers (documents of a Panamanian law firm which unveiled the off-shore tax shelters for wealthy clients all around the globe). The Panama papers revealed that children of Prime Minister Sharif were beneficiaries and shareholders in two off-shore companies (Javed, 2018). These companies controlled four apartments in the high-end area of Mayfair District, London which were used by the Prime Minister and his family. Two judges of the five-member Bench initially ruled that the Prime Minister had failed to account for his wealth and declared that he should be immediately disqualified. However, the majority of Bench decided to constitute a special Joint Investigation Team (JIT) to enquire the sources of Prime Minister and his family's wealth (Javed, 2018). The JIT discovered that the Prime Minister had failed to disclose his un-withdrawn income from a UAE-based company, Capital FZE. Interestingly, the apex court disqualified the Prime Minister on this minor infraction and ordered National Accountability Bureau (country's special anti-graft body) to investigate the matter relating to the wealth of executive head of the country (*Imran Ahmed Khan Niazi v. Muhammad Nawaz Sharif*, 2017). So, what started as a case into discovering the sources of wealth of Prime Minister ended with his disqualification on a ground that was initially not agitated in the proceedings.

To this day, the judicial decision resulting in disqualification of Nawaz Sharif has remained a controversial decision. Numerous experts criticized the decision on the ground that it abridged the right to fair trial of the former Prime Minister (Hussain, 2018). Furthermore, the Supreme Court undertook an inquisitorial role in this case which also raises question as to whether the top court could become a trial court in matters involving public interest. All in all, the Court asserted its supremacy over the executive branch and shifted the balance of power towards itself.

### **Conclusion**

Theory of constitutionalism is premised upon division of powers, enforcing supremacy of law and placing legal limitations on exercise of public power. Constitutionalism ensures that there is no abuse of power by any branch of government. In relation to this theory, the role of judiciary is of pivotal importance. An independent judiciary is necessary to guarantee that individual rights of citizens are not compromised in any manner by those entrusted with governance of the state. Judicial review is an important constitutional tool that enables judiciary to exercise check over the

other two branches of the government. However, it would be imprudent to assume that constitutionalism gives unlimited powers to the judiciary. Judiciary must operate within its constitutional mandate. The unique position of judiciary often incentivizes it to play a defining role in matters having political ramifications. This has resulted in judicialization of politics which has seriously undermined the role and authority of legislative and executive branches of government.

It is somewhat obvious from the discussion in this paper, that superior judiciary has been at the forefront of every important political dispute in Pakistan. The Court has used its powers under the pretext of enforcing fundamental rights of the citizens. By using its original jurisdiction to resolve political controversies, the Court has enlarged its constitutional role exponentially. The important constitutional cases signify that this increase in judicial power came at the expense of a weakened democratic dispensation. Oftentimes, the Court has not shied away from arrogating legislative and executive powers for the judicial branch. The sketchy jurisprudence in important constitutional cases also points out to the fact that judicialization of politics does not augur well for the phenomenon of constitutionalism. Constitutionalism works best when each branch of government acts within its constitutional domain as this theory never gives primacy to one branch of government over the other. Therefore, it is important for all the stakeholders to re-evaluate the pitfalls in the constitutional jurisprudence of the country and come up with an effective model of constitutionalism that discourages judicialization of politics. The constitutional democracy in the country would be strengthened if each branch of government respects the constitutional role of the other branches.

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