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Separation of Powers and System of Checks and Balances: A Debate on the Functionalist and Formalist Theories in the Context of Pakistan

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Abstract *Modern-day democracies are constructed on the constitutional mechanism of separation of powers introduced in the U.S. Constitution where Pakistan stands with no exception. With qualitative research methodology, this paper aims to investigate the following issues: origin and evolution of the concept of separation of powers with reference to formalist and functionalist theories, application of tripartite government in the context of Pakistan, why the application of this concept could not receive its due appreciation in Pakistan, the role of the military as an additional unavoidable stakeholder in the evolution of trichotomy of powers in the democratic transition and judicial response to circumscribe unbridled military regimes in Pakistan. This article also explicates how the state organs can help identify their jurisdictional bounds to avoid the potential threat of confrontation and suggests how in the transition of institutional demarcations self-realisation of constraints can play a considerable role to comprehend the spirit of constitutionalism.*

Key Words: Formalist and Functionalist Theories, Jurisdiction, Limitations, Restraints, Separation of Powers.

Introduction

Despite the fact that Pakistan has been following the U.S. constitutional doctrine of separation of powers and system of checks and balances, the application of trichotomy of powers in Pakistan could not receive that appreciation. Even though, the constitution envisages the trichotomy of powers and the Supreme Court of Pakistan has also endorsed division of state authority in three branches of the government: judiciary, executive, and Parliament (*Sayed Yousaf Raza Gailani v. the Registrar of the Supreme Court, 2012*). Nevertheless, the demarcations of these functions are not clearly articulated, which create institutional conflicts. The underlying objective of the introduction of this doctrine is to help each organ identify its constitutional limits, accept existence and jurisdiction of other state organs, restraint its own authority, keep surveillance on others so they may not transgress their authority, and not to hinder their functioning.

In order to conduct this research, Qualitative and deductive research methodology has been used. This paper has been divided into six segments: In the first segment, an overview of the separation of powers

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and self-realisation of constraints has been given. In the second segment, the historical perspective of the concept has been provided. In the third segment, formalist and functionalist approaches have been examined. In the fourth segment, the perceived advantages and risks attached to these approaches have been discussed. In the fifth segment, the tripartite government in the context of Pakistan has been explicated. In the sixth segment, the article has been concluded while emphasising on the self-realisation of constraints, which is passive virtues. While applying the theoretical framework of self-realisation of judicial restraint, coined by *Thayer (1893)*, the researcher strives to highlight the inevitability of self-realisation of constraints for all the state organs and institutions, in order to make a successful transition of constitutionalism in Pakistan. In the judicial context, it refers to passive virtues, expounded by [Bickel \(1961\)](#) who furthered the concept in his literary work. Keeping in view the ongoing tension among the state organs, the researcher urged for the active use of passive virtues.

Separation of Powers: Historical Overview

Separation of powers is a model of a democratic system whereby the political powers are distributed among three governmental branches: legislature, executive, and the judiciary. Each branch exercises its sovereign authority within its constitutionally designated sphere, subject to a reasonable control by the other state organs, in order to avoid excessive use of authority and its undue intervention in the other state organs. In federal democracies, tripartite government refers to three competing sovereigns. The American democratic system got its foundation on this doctrine, which is globally followed by the other democracies. This concept reflects its roots in *the Spirit of Laws* authored by *Montesquieu*.

“Check” refers to the capability, right, and duty of each organ to administer activities of the other organs. Similarly, “balance” refers to each organ’s capacity to regulate its authority so as to curtail the excessive authority of the others ([Sultana, 2012](#)). Keeping in view its vitality in democratic arena, its inevitability in the conceptualisation of constitutionalism, and its effects in the constitutional development of Pakistan, a thorough investigation into the historical, conceptual, and philosophical nature of this doctrine indispensable. No doubt, *Montesquieu’s Spirit of Laws* played a key role in shaping the thinking of the members of the United States’ Constitutional Convention. In France, a little book, *Persian Letters*, was published anonymously in 1721. This book addressed socio-political and literary issues in an exceptional way that people became interested in discovering the author. Later on, it was found that the author was an aristocrat named *Montesquieu*, who was a Chief Justice at Bordeaux ([Rossman, 1949](#)). This book significantly attracted *Montesquieu’s* literary capacities. He, consequently, resigned from his public office and switched to a career of letters.

Montesquieu’s fame is principally based on his publication, *the Spirit of Laws*, wherein he set-forth separation of powers’ doctrine. Nevertheless, this doctrine was not originated by *Montesquieu*, rather ancient Athens, Plato, and Aristotle realised the security to an individual’s freedom founded in government, which abstained the concentration of power in one body. The first historical roots of this concept could be found in ancient Greece, which was widespread in the Roman Republic as part of the Roman Constitution. Aristotle (384 – 322 BC) in his literary work, *‘The Politics’*, confirmed that each constitution is comprised of the following three necessary elements: the deliberative, the official, and the judiciary. However, this concept emerged in England in the form of parliament, councils of the king, and court. Later on, this concept was further advanced by a French philosopher, *Baron Montesquieu*, in the form of *‘Montesquieu Tripartite System’*. A Greek historian, *Polybius*, highlighted inescapable tendency towards decay manifested in governments that bestows all their authority upon the single element of the populous. In the venture of the Roman government, all the elements, the counsels being the monarchical, the senate being aristocratic, and the democratic elements being the popular assemblies, played their due role; each could check other in order to prevent the improper exercise of authority.

Montesquieu was looking for principles of constitutional law, applicable to all forms of governments, which prevent decay and preserves people's liberty. This pursuit led him travelled extensively through Europe and tarried for three years at England (1729 to 1731) where he closely studied the English Constitution. In England, he realised to have found the government's principles. One of the most valuable attributes of his book was the description of the separation of powers by making an analogy with the Constitution of England. In *Spirit of Laws*, he referred to English form of government: laws were made by parliament, enforced by the crown, more likely by the crown's ministers, and interpreted as well as applied by the courts.

The Spirit of Law published thirty-nine years before the U.S. Constitutional Convention of Philadelphia was the most frequently quoted book with the highest authority. Among constitution's framers, Hamilton and Madison along with John Jay, who was the first Chief Justice of the USA, contributed a number of newspaper articles, which later on printed together as the "*Federalist*", quoted from Montesquieu's book. The constitution's founding fathers unanimously convinced that the government would never turn against citizens' right where the government's functions were distributed into legislative, executive, and judicial parts. This doctrine was more than a theory and was regarded as one of the heritages of revolutionary forefathers, which is considered to be the first of the great underlying principles of the U.S. Constitution. Considering the potential threat of tyranny and corruption, the framers of the U.S. Constitution constrained the federal authority through checks and balances. The framers where considered cautious revolutionaries for elaborating the concentration of powers being the very definition of tyranny (Madison, *The Federalist* No. 47. p. 301). Hence, divided the authority and devised a system for its control ([Morrison v. Olson, 1988](#)).

According to James Madison, the immense security against the potential threat, in the shape of gradual concentration of authority, lies in the delegation of authority and constitutional means, in order to resist the undue intrusion of the others (Madison, *The Federalist* No. 51. Pp. 321-22). So, to make sure that none of the organs dominates others ([Strauss, 1984](#); [Greene, 1994](#)). The framers went beyond the simple division of state power into three groups, made each group answerable and subject to temporal demands (Madison, *The Federalist* No. 51, pp.321, 322). Owing to competing characteristics and accountability, the branches were susceptible to conflicts rising that could turn to institutional rivalries, which could be used for tyrannical ends ([Cutler, 1988](#)). The following segment examines contributions of the framers of the U.S. Constitution in the introduction and application of the tripartite system in the U.S. Constitution.

Separation of Powers with the Glimpse of Madisonian Model

Madison's primary objective in advocating the tripartite government was aimed to discourage governmental tyranny, coupled with the arbitrary and capricious rule, which is the outcome of the government of men, not of laws. The separation of powers is considered to be the central democratic character of the U.S. Constitution. Madison desired a mechanism of checks and balances. He referred tyranny to the concentration of all governmental powers in the same hands, whether self-appointed, inherited, or elective, which may be regarded as the basic definition of tyranny ([Eidelberg, 1968](#)). Both accumulations of powers and tyranny were considered interlinked and inseparable ([Vile, 2012](#)).

The framers retained Montesquieu's teachings about principles of separation of branches in the U.S. Constitution. They, however, discarded the notion of branches' representation of the major social class such as the aristocratic, the democratic, and the monarchical. Likewise, the primary objective linked with the concept of division of powers was the prevention of governmental tyranny. Conversely, tyranny refers to a distorted form of monarchy coupled with the arbitrary and capricious rule, wherein powers were accumulated in one body.

For instance, the government enjoys absolute authority where all the state powers are united, irrespective of the fact whether these powers are vested in one hand or with a large number. In such situations, the legislator, the accuser, the judge, and the executioner will be the same party. There would

be hardly probability of an accused' acquittal where a judge himself will be a party to the case. Similarly, any union of the two branches provides the same effects: if both legislative and judicial authorities are united, the outcome will be uncertain laws, which would be reflected on the prejudice of the judge. Where judiciary joins with executive, the judge might behave with violence and would be oppressive. Likewise, the collation of executive and legislative powers would create obstacles for the protection and security of the subjects. There would be no liberty to the people because the laws would be enacted and executed tyrannically ([Carey, 1978](#)).

The avoidance of capricious and arbitrary government was the primary objective sought through the separation of powers, where no branch shall exercise another's functions. Similarly, in a democratic form of government, it is of great concern not only to provide a safeguard against the tyranny of its rulers but to protect society's one part against the injustices of the other part. Madison sought to overcome governmental tyranny, which is closely linked with the arbitrary and capricious government. Madison conceived a situation where governmental tyranny will not be the outcome of concentration of powers, and idealise a situation where those having collective governmental authority will not necessarily be above the law nor would be allowed to exploit the rules according to their personal whims. The history witnesses that concentration of powers over an extended period of time certainly results in governmental tyranny for benevolent dictators are hard to come by ([Carey, 1978](#)).

Madison's viewpoint that separation of powers, being an essential requirement for non-tyrannical government, enforces a restriction on his hypothetical approach for other values and concerns need alteration with this fundamental condition. The foregoing debate reveals Madison's desire to capitalise two parallel objectives: separation of powers and republicanism. Madison and most of the framers advocated the idea of imposing restrictions on decision-making, which is consistent with the philosophy of constitutionalism. Keeping in view the limitations of this theory, the constitution could only be changed through the process of a constitutional amendment. Separation of powers, being an integral constitutional attribute, is inseparable and immune from modification or obliteration by simple majorities. The foregoing analysis and its designated role in Madison's model, the separation of powers open more avenues for research. The system of government fairly realising political equality and majority rule, without active separation of powers, will turn into tyranny.

The Doctrine of Separation of Powers: Rise and Fall

The U.S. Constitution of 1789 is considered to be a prudent compromise as most of it is the outcome of experience, not of the principles. Since its inception, the U.S. Constitution has controlled governmental authority and imposed constraints on the undue exercise of those powers. *Professor Paul Freund* regarded it as a structure as well as an organism, which should not be treated just like a statute. The constitution uses certain words, phrases, and parts being used or derived from history and common law such as federalism and separation of powers, which are not confined to specific word or provision rather used in various contexts ([Kurland, 1986](#)).

The original constitutional conception of dividing power was not confined to the separation of powers; rather balanced and controlled government. This system suggested oversight of one by other or the consensus of two or more governmental agencies for the validity of an action. Indeed, *Madison's* realisation for the powers' division proposes a more substantial idea of balancing governmental power. The separation of powers definitely encompasses the idea of a fundamental difference in the governmental functions, each to sovereign exercise authority in its own sphere, none to operate in the realm designated to another.

Since its inception, the U.S. Constitution is not the product of theory but experience, which was not limited to Holmes' dictum in *The Common Law* about law and logic that "the life of law has not been logic: it has been experience" ([Holmes, 2009](#)). It has got recognition and acknowledgement at the Convention of 1787. *Mr Dickenson* furthered the idea that experience must be our only guide; reasons may mislead us

([Tansill, 1927](#)). Locke asserted three categories of powers: legislative, executive, and federative. In modern-day, the 'federative' may be referred to foreign affairs, allocated to the executive branch of the government ([Ashcraft, 1986](#)).

The U.S. retained the Aristotelian form of government but distributed political powers making essentially homogeneous, which, according to *Jefferson*, became the first principle of good governance. The tripartite government of executive, judiciary, and legislature and division of the legislature into two or three branches was only partitioning of the political powers. The underlying objective of the creation of polarity of government's branches was manifold: to make all isolated yet responsible and controlled by people, interbranch checking mechanism, and preventing each from asserting itself too far. *Madison* asserted that *Montesquieu* did not strictly reject partial overlapping of the governmental departments. He was only concerned that where the complete authority of one branch is thoroughly used by the same hands, having the complete authority of another branch, the basic principles of a free constitution are challenged (*Madison*, *The Federalist No. 47*, pp. 325-26).

The new conception of balancing powers was well described by *Professor Wood*, which was referred to by *Madison* that connected man's interest with the constitutional rights. Controlling governmental abuses must be a reflection of human nature. The government is nothing except the supreme of all reflections on human nature. No government would be required if men were angels. Likewise, there was no need for external or internal governmental control if angels were to govern men. In order to design a government, where men have to govern men, two biggest challenges are faced: permit the government to control the subjects and force the government to control itself. No doubt, government's dependence on people is considered to be the principal control on the government; however, the experience taught inevitability of ancillary precautions (*Madison & Cooke*, *The Federalist No. 51*, 1961, p. 349).

Both *Madison* and *Hamilton* believed that democratic legislature was the potential threat towards concentration of all governmental powers. The others believed that the singular executive is a danger of tyranny. Judiciary contributed a very minute role in the theoretical constructs of *Montesquieu* and *Locke*. Nonetheless, the judiciary was of key importance in the conceptualisation of limited constitution, in order to limit legislative authority. Even through the framers of the constitution believed judicial review may exceed its jurisdictional circle, the invention of judicial review in the separation of powers became an essential element. According to *Edward Levi*, the framers of the constitution had not envisaged a government that sought confrontation; rather they believed that the system of checks and balances would make it more harmonious ([Levi, 1976](#)).

Separation of powers was a not a measure to validate a particular governmental action; rather, it was a foundation for framing constitution. The growth in the judicial branch's stature was consequent upon the failure of dispersion of powers. The main object for its invocation was to effectuate the government's powers separately, in order to protect the liberty of people. Further, history itself evident that vigilant judiciary was the only tool between the potential tyranny of the branches and people's liberty.

Separation of Powers in the Light of Functionalist and Formalist Approaches

The U.S. Supreme Court while analysing the separation of powers' issue used two competing approaches: the functionalist and the formalist methods. Both concepts have advantages and disadvantages. Nevertheless, with the decision of *Morrison v. Olson* (1988), the court's analytical method seems to have been changed from formalist to functionalist approach. Due to its positive impacts on inter-branch behavior, functionalism is the ultimate method of choice. Unlike unproductive positional bargaining, which may be the outcome of the formalist approach, the functionalism's balancing test motivates problem-resolving negotiations between political actors. These negotiations help resolve political matters politically, leaving courts as a last resort.

In the recent past, there have been debates and concerns regarding the separation of powers. The U.S. Supreme Court, in its various decisions (the *United States v. Nixon*, 1974; *Immigration & Naturalization Service v. Chadha*, 1983; [Bowsher v. Synar](#), 1986; [Morrison v. Olson](#), 1988) has dealt with issues involving legislative-executive conflicts and judiciary's role therein. In these cases, the U.S. Supreme Court has applied both formalist and functionalist approaches in order to resolve the dispute regarding the trichotomy of powers.

The Formalist Approach

The formalist method is based on the belief that the doctrine of separation of powers entails each governmental branch to perform its functioning while maintaining optimum independence. The proponents of formalism argue that governmental authority's division into three branches was aimed to safeguard against the potential tyranny. The formalist approach seeks to address inter-branch clashes by sketching a sharp line among the governmental branches and confining every branch to its designated responsibility ([Immigration & Naturalization Service v. Chadha](#), 1983). In the formalist approach; there is no concept of checks and balances because each governmental branch has to work within its jurisdictional circle and not to interfere with the other branches. The following figure highlights a diagrammatical view of the formalist approach.

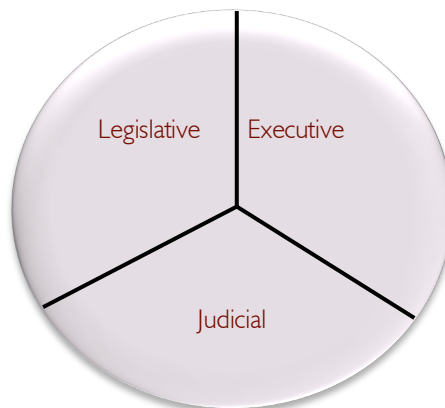


Figure 1. Formalist Approach towards Governmental Branches

The Functionalist Approach

Contrary to the formalist approach, the functionalist method interprets constitution that contemplates that each governmental branch is not to operate with absolute autonomy. In order to make a workable government, the constitution ensures its branches' separateness but interdependence, autonomy but reciprocity (*Youngstown Sheet & Tube Co. v. Sawyer*, 1952). This method comprises of two things: determination of each branch's functions involved with the disputed act and realistic impacts on these branches. While considering the fact whether or not a branch's core function has been hindered or intervened, the functionalist method stresses on balancing and flexibility by analysing the whole structure of relationship among the branches ([Strauss](#), 1986). The courts, while applying the functionalist test, limit their role in order to resolve inter-branch disputes. The following figure highlights the diagrammatical view of the functionalist approach.

[Eskridge \(1998\)](#) further investigated the complexities attached with the formalist-functionalist dichotomy as earlier articulated by [Strauss](#). The author broadly presented a mechanism for contrasting

formalist and functionalist theories regarding the distribution of authority among three branches of the government and highlighted judiciary's role in this transition of powers. The author investigated hypothetical approaches to the dispersion of authority. The author advocates that governmental legitimacy is not mono-vocal; rather, it is multi-vocal, based on rule-following formalism, the rule of law, political efficacy functionalism, and flexibility. This article has been examined with the perspective of Pakistan's constitutional and structural mechanism about trichotomy of powers.

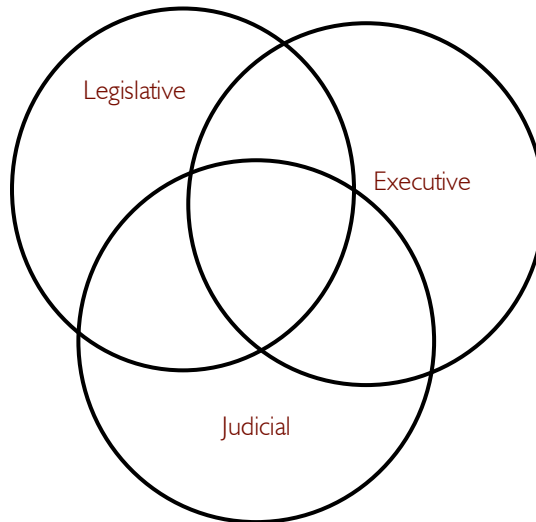


Figure 2. Functionalist Approach towards Governmental Branches

The Formalist and Functionalist Approaches: Perceived Pros and Cons

The courts' inconsistent approach while dealing with inter-branch disputes explore that both concepts have its advantages and disadvantages: The proponents of formalism argue that formalist approach draws a clear distinctive line that contributes stability in the government's branches, which ultimately ensures the rule of law. Moreover, institutional-demarkations help reduces uncertainty in inter-branch's conflict resolutions ([Strauss, 984](#)). Nonetheless, such rules being rigid create hindrances for each branch while dealing with the changing political realities. The opponents, however, criticised formalism for constituting improper judicial activism in political disputes by leaving these to the elected branches.

Functionalism considers the overall conditions of each legislative-executive conflict. The greatest perceived benefit of the functionalist approach is its stress on the mechanism of checks and balances, which reflects institutional realities ([Sargentich, 1986](#)). While protecting fundamental democratic principles, it easily accommodates both governmental as well as societal changes. Nevertheless, the opponents to the functionalism criticised it for its inherent tensions. Even though formalists are criticised for rigid doctrinism, but in the case of legislative-executive conflict, the functionalist test considered a determination of each branch's functions and its realistic effects. Judges must consider each function, in order to balance the effect of the issue and each branch's interest, which make the application of functionalist test more complicated ([Clair, 1989](#)).

The above analysis unveils that both formalist and functionalist methods for resolving separation of powers disputes are not entirely satisfactory. Some critics discouraged judicial involvement in the legislative-executive conflict and endorsed these problems should be addressed through the political process. They believed that checks and balances provide sufficient mutual control over the legislative and the executive branches, making the system self-controlling, and discouraging judicial intervention. Judicial intervention is

considered counterproductive because of the apprehension of retaliation ([Chopper, 1980](#)). Nonetheless, courts' total-abandonment in the political process is not desirable. Even though interbranch disputes should be amicably settled by the political process, judicial involvement remains indispensable.

Keeping in view the principle of judicial restraint, the judiciary should keep a limited control. The judicial involvement is required only in the cases of political breakdown, where the system is no longer self-controlling, so formalism is the favorable approach. It advances the objective of limited judicial involvement and contributes to making the government functional by encouraging legislative-executive cooperation.

The Trichotomy of Powers – Pakistan's Perspective

Since its inception, Pakistan has been an executive influenced state that corresponded to the Mughals' reign and to the British Raj in the Indian subcontinent. In the Mughals' epoch, the emperor was considered to be the fountain of all powers. The emperor ruled the subjects by decrees, *Shahi Farmans*. Further, there was no concept of the constitution during the Mughals rule, which lasted from twelfth to the eighteenth century. The Britishers introduced to the subcontinent as merchants and gradually took hold of the subcontinent, disbanding the Mughals' rule in 1858 ([Khan, 2005](#)).

The British Parliament enacted a series of Acts in order to govern the Indian subcontinent (The Government of India Act 1858; The [Indian Councils Act 1861](#); The Minto-Morely Reforms 1909; The Government of India Act 1919; The Government of India Act 1935). The 1935 Act conferred wide-ranged authority to the Governor-General, Viceroy. In the subcontinent, being representative of the British crown, the Viceroy got final political authority and entrusted with vast discretionary authority. He concentrated the authority of all forces: the army, the navy, and the air force. He had special legislative powers and could seek the council's advice except for matters related to external affairs, defence, and matters where his special responsibility was involved. Further, he was not bound by the ministerial advice. The Act also contained certain emergency provisions authorising the Governor-General to extend his authority to all or any of the powers being exercised by the federal authorities excluding Federal Court ([Khan, 2005, p.21](#)).

The 1935 Act, with slide modifications, was adopted as the Constitution of Pakistan. Similarly, the first Constituent Assembly of Pakistan was created by virtue of the Indian Independence Act, 1947, which was assigned with the task of constitution's drafting. The Act also authorised the cabinet for governmental activities, and authority of the Governor-General was subjected to the cabinet's advice. Nevertheless, the cabinet was responsible for the Constituent Assembly. Even though Pakistan came forward as a parliamentary government, but virtually it turned to an administrative state with viceregal traditions ([Ziring, 1997](#)).

The Governor-General enjoyed broad discretion and had the authority to promulgate ordinances, appoint high officials, including the Prime Minister, the Federal Ministers, and Judges of the Superior Judiciary. In some exceptional circumstances, the 1935 Act also authorised the Governor-General for dismissal of the Prime Minister without taking into account the advice of the Council of Ministers. The viceregal system of government inherited from the British was not discarded in subsequent years. As evident from 1947 to 1956, Pakistan had experienced four successive Governors Generals and three Prime Ministers.

Despite the political challenges, the first constitution was promulgated in 1956, which abolished the Governor General's office and extended the same authority to the President. The constitution provided one house of Parliament, National Assembly. Though the Prime Minister presided over by the cabinet, the president's executive authority was more than that of the elected Prime Minister. Despite its federal structure, the President remained authoritative, and the provinces were less authoritative than the center ([Newberg, 2002](#)). In 1958, first Martial Law was enforced, which suspended the constitution. In 1962, another Constitution was promulgated by the army, which abolished the Prime Minister's office and conferred all the executive powers in the President: the dissolution of the assembly, issuance of ordinances,

and declaration of emergency. Apparently, it was a civilian rule; nevertheless, the entire political system revolved around Ayub Khan. The 1962 Constitution institutionalised military intervention into politics ([Ziring, 1997](#)).

In 1969, the country faced another martial, after a mass movement against Ayub Khan that led to his resignation. This was followed by tragic events, including war with India in 1971 and secession of East Pakistan, now Bangladesh. In 1973, Pakistan adopted another Constitution that envisaged parliamentary government with bicameral legislation. Further, the constitution also endorsed provincial governments allocating legislative powers. The constitution conferred the chief executive authority in the Prime Minister, and the president was required to act on the Prime Minister's advice.

In 1977, the Army Chief, *Zia-ul-Haq*, disbanded the National Assembly, dismissed the PPP's government, suspended the constitution and was replaced with the Provisional Constitutional Order (PCO), which legalised military intervention and allowed constitutional amendments. Through eighth amendment to the constitution, the executive authority was extended to the President who was further empowered to dissolve the National Assembly (Article 58 (2) (b) of the Constitution of Pakistan of 1973). Like colonial viceroy, the President assumed extraordinary authority, in order to regulate the state's affairs.

After Zia's death in 1988, both PPP and PML (N) served for two terms each, but neither of them could complete their tenure as both had been dismissed by the incumbent Presidents on corruption charges, and dissolved the assemblies before completion of their term. In 1997, through the introduction of the thirteenth amendment, the Parliamentary sovereignty was restored, and the executive authority was shifted to the Prime Minister. Since 1947, it has been a continuous practice that each state's and government's heads inclined to enjoy all the executive powers.

In 1999, the military intervened again, which the court justified the traditional doctrine of necessity. The court validated Musharraf's emergency and PCO Orders. Through a referendum in April 2002, Musharraf elected himself as a President and introduced the Legal Framework Order (LFO). The LFO revived eighth amendment clauses and made him more powerful. In 2003, the seventeenth constitutional amendment was introduced whereby parliament's authority was brought to a rubber stamp ([Sultana, 2012](#)). The President kept himself with the legislative initiatives as evident between 2002- 2007; the President has promulgated 134 Presidential Ordinances, whereas the National Assembly passed 51 Bills only.

In February 2008, the PPP government formed a coalition government. In the new democratic setup, the President enjoyed significant powers. Nonetheless, on April 8, 2010, the National Assembly passed the eighteenth amendment, which curtailed the President's authority to dissolve parliament unilaterally. This amendment initiated a series of changes: permitted the Prime Minister to serve for more than two terms, a bar on the courts to validate suspension of the Constitution, Judicial Commission and Parliamentary Committee was formed for the appointment of judges, and bar the president's authority to appoint Election Commission's head and declaration of emergency unilaterally ([Sultana, 2012, p. 68](#)). Nevertheless, the judiciary showed concerned about the appointment procedure.

In order to avoid potential conflict on appointment matters, the nineteenth amendment to the constitution was introduced. This amendment incorporated certain changes in the Judicial Commission and the appointment process: in the Judicial Commission judges were raised from two to four, increasing the strength of the Judicial Commission from seven to nine. For ad hoc appointment, Chief Justice has to consult the Judicial Commission and has to seek approval from the senate, where the N.A. has been dissolved, and the Parliamentary Committee that gives final approval of the judges' appointment ceased to exist. The underlying objectives of 18th and 19th constitutional amendments were to avoid inter-branch governmental conflict, upholding the supremacy of the parliament, and imposing reasonable restrictions on the judiciary so as to avoid its potential exploitation.

The military being an unavoidable stakeholder, played a very critical role in the whole democratic transition. Unlike the civilian governments, the military regimes favored presidential form of governments where maximum authority is concentrated in one person who can be easily controlled. The military regimes adversely affected the trichotomy of powers as a fragile judiciary can be easily influenced to validate extra-constitutional actions. Consequently, judiciary played a crucial role in undermining the parliamentary sovereignty and determination of the country's political destiny. The judiciary while validating the military coups undermined not only the representative institutions but also reduced its own autonomy. The judiciary has accepted constraints on its own autonomy while validating extraconstitutional and undemocratic acts. This self-constraints on the judicial autonomy were first witnessed when Prime Minister Muhammad Ali Bogra's government was dismissed by the then Governor-General, Ghulam Muhammad. The Supreme Court observed that necessity makes unlawful acts lawful. The judiciary repeatedly legalised the military's interventions on the pretext of so-called necessity doctrine at the expense of civilian governments and its own autonomy (Cohen, 2005).

The following charts highlight the military's direct rule and fragile democracy in Pakistan:

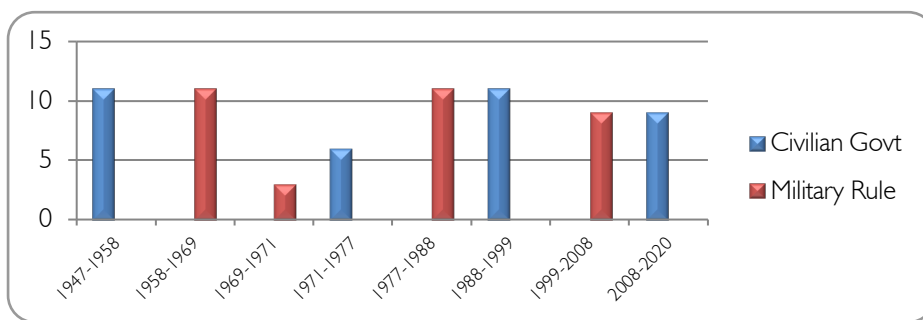


Figure 3. Duration and Number of Years of Military and Democratic Rule

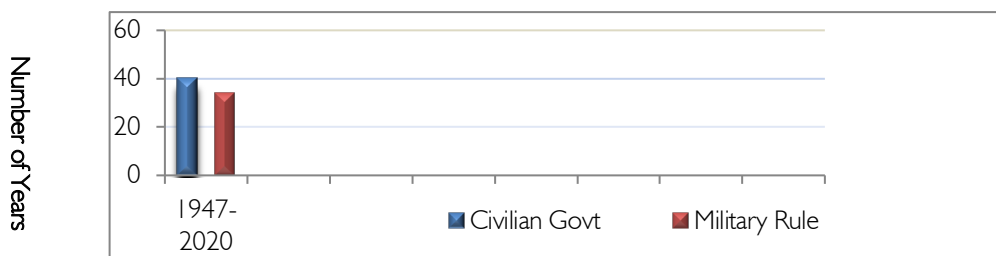


Figure 4. Total Span of Military and Democratic Rule (1947-2020)

As depicted in the above Charts, for almost half of its political journey, the military had kept Pakistan under its direct rein. During its direct rule, the military had entrenched its authority and has made arrangements, in terms of making coalition with the politicians and political groups, in order to transform its authority to the representative governments and ensure its indirect governance in the civilian rule. In the transformation of the army's control, the judiciary significantly contributed and legitimized the army's extraconstitutional acts on the pretext of the state necessity, at the expense of civilian government as well as its own autonomy. However, the judiciary response, in the validation of the extra-constitutional actions, never remained absolute rather subjected the military's unbridled authority to gradual restrictions. While validating their extra-constitutional actions, the judiciary has gradually circumscribed military's control.

Like politicians, judiciary faces the same threat of military intrusion, which has evidently reflected in decision making. However, the military's constraints and judiciary's vulnerability to such constraints has never been absolute, rather diminished over time. The judges, in their individual as well as institutional capacity, have consistently asserted some measures of autonomy from the military. Over time, the scope of validation to the military's extraconstitutional acts has been narrowed down. In the recent struggles toward judicial independence, the judiciary has not only considerably succeeded in safeguarding its autonomy from the military but forwarded the same efforts against the civilian government, in order to overcome the potential threats of confrontation between the judiciary and the parliament, 18th and 19th amendment were introduced. However, leaving any branch, including the judiciary, without reasonable control is against the functionalist spirit of the separation of powers. Both Islam and western democracies believe in moderate approach. Pakistan's democracy which is going through its transition, the judiciary stands with no exceptions and susceptible to the exploitation of its authority by encroaching upon the others' sphere. In the prevalent circumstances, application of the formalist approach in the form of absolute autonomy is not an ideal approach. There should be some constraints in order to the controlled unbridled authority of the state organs. While imposing these constraints, a mechanism of balancing judicial autonomy and its constraints must be devised, in order to ensure its real independence without any exploitation of its authority.

Conclusion

To conclude with, the concept of dispersion of powers, which was initially originated in ancient Greece and the Roman Republic was successfully introduced to the framers of the U.S. Constitution by *Montesquieu* in his literary work, *the Spirit of Laws*. In the U.S., this concept was thoroughly examined and experimented in both formalist and functionalist forms. Despite the fact that the courts' jurisprudential approach towards formalist and functionalist forms remained inconsistent, the majority of the legal and political jurists' advocates functionalist approach. In Pakistan, the application of formalist and functionalist approaches remained controversial. Pakistan is a newly established democracy, is passing through its transition where the state organs would take a reasonable time in order to identify their bounds. In this whole democratic transition, the military plays a very significant role as an additional unavoidable stakeholder. The military not only directly rule this country for more than three decades, but also transform its authority to the civilian rule. During this transformative preservation, the military deep-rooted its authority in the civilian government left adverse impacts on the other state organs. In this whole democratic transition, the judiciary came up with exceptional autonomy. The judiciary not only invalidated extraconstitutional actions of the military but also confronted with the parliament on the method of judges' appointment introduced in 18th constitutional amendment, which parliament accepted and addressed in the form of 19th constitutional amendment. Considering the judiciary role in the whole transition, a need for striking a rational compromise between judicial independence and its constraints is inevitable.

In order to overcome potential interbranch conflict, self-realisation of constraints, being passive virtues, is the most viable option for long term consolidation of democracy in Pakistan. The state organs share coequal status and no organ dictates or impose restrictions on others, rather shares authority for ensuring state functioning and public welfare. For instance, in the U.S. judiciary imposed certain constraints on its authority and sketched a line of requirements for entertaining a case: there must be some legal dispute between the adverse parties. While complying with the justiciability doctrine, the U.S. courts refuse to hear political disputes and prefer such disputes for political resolution under political question doctrine. All these judicial standards are the outcome of judiciary's self-realisation of its constraints. In Pakistan, the state organs have been passing through its transitional phase of development where organs will take a reasonable time to realise their working-boundaries. The sooner these organs realise their maximum constraints, the more realistic and progressive would be the democratic transition and constitutionalism.

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