

THE SUPREME COURT OF PAKISTAN AND INSTITUTIONALIZATION: THE CASE STUDY OF NATIONAL RECONCILIATION ORDINANCE

^{1*}Nauman Reayat, ²Dr. Anwar Ul Mujahid Shah, ³Dr. Muhammad Kaleem, ⁴Syed Arshad Ali Shah

¹Lecturer in Pakistan Study, Abdul Wali Khan University Mardan, Pakistan. *Corresponding Email: nauman381a@gmail.com

²Lecturer, Department of Sociology, Political Science and Education, Bacha Khan University, Charsadda Pakistan

³Assistant Professor, Department of Sociology, Political Science and Education, Bacha Khan University, Charsadda Pakistan

⁴Lecturer, Department of Management Sciences, Bacha Khan University, Charsadda Pakistan Email: arshad@bkuc.edu.pk

ARTICLE INFO	ABSTRACT
<p><i>Article History:</i> Received: 10 Sep 2019 Revised: 23 Dec 2019 Accepted: 15 Feb 2020 Available Online: 05 Mar 2020</p> <hr/> <p><i>Keywords:</i> Supreme Court of Pakistan, Institutionalization, National Reconciliation Ordinance (NRO), Good Governance.</p> <hr/> <p><i>JEL Classification:</i> G34, O16</p>	<p>The Supreme Court of Pakistan (SCP) is one of the pillars of the Government of Pakistan, which is not only a player in the game of governance, but also has the capacity to rewrite the rules of the game in favor of institutionalization. Various organizations of the state started organizing themselves around rules and hence gave rise to an institutionalized form of constitutional governance. In case of NRO, SCP upheld supremacy of the Constitution of Pakistan 1973, independent of political considerations. It's emphasis on the constitution has driven the process of governance in the country in the direction of institutionalization. This research aims to discover the institutional role of Supreme Court of Pakistan in good governance through its verdict(s) on National Reconciliation Ordinance (NRO). The way in which stability, coherence, adaptability, and autonomy have been achieved by the Supreme Court of Pakistan in the said case will be traced and analyzed.</p>

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1. INTRODUCTION

Governance is a process in which two main elements are involved: governor and governed. Both governors and governed, consensually, establish the rules through their interactions with the passage of time. Both the players, due to their conflicting interests at different stages created various problems of order and control. Such problems badly affect the ecology of governance. In order to address the problems pertaining to the environment in which process of governance evolves, two things are required. First, actions of governed are subjected reasonable force of law. Such force of law will control the actions of governed in harmony with the functions of government machinery. There could be many means of such rational control: rule of law, constitutional order etc. Second, government in their determination of reasonable, legitimate and legal control of those who are governed, is required to control itself to prevent itself from usurpation of rights of governed (Madison The Federalist No 51). Major problem with global south is that two types of control are not in harmony and normalcy. Such unbalance between two types of control strains order of the government and society. Cicero proposed solution for it by spotlighting two requirements for materialisation of smooth and good governance: *Consensus juris* and *utilitatis communion*. *Consensus juris* is long-term engagement and the union of an appreciable number of people over predefined rules, laws, rights and duties. *Utilitatis communion* is the other mean and way of union which is the mutual sharing of resultant advantages, which is created as incentives by system of rules and laws.

In many modernizing countries, governments are still unable to perform the first function, much less the second. These rules, laws, statutes, regulations are the humanly devised constraints and can be both formal and informal, which are considered as institutions by Douglas (1993). Institutions are those principles and list of provisions which steer, the game of governance and such game of governance is played between organizations. Newton and van Deth (2010:9) highlight the importance of institutions as 'structures of government'. Constitutions represent a set of fundamental laws that determines the central institutions and offices and powers and duties of the state (2010:71). Governance in a modern or modernizing society is contingent upon two dimensions. First dimension is scope of support which underscores the level, nature, form and extent of activities being taken place according to rules (which can be constitution, statutes, legislative acts or in the abstract term rule of law) and through the channels carved out by political organizations. It simply means the intensity of engagement of society with its political organizations. Second dimension is the weight of institutionalization. The process in which organizations and procedures designed for function of organizations attains sustainability and value is known as

institutionalization (Huntington 1968). The term value as the requirement for such process has also been mentioned by author writers as “value-infusion” (Selznick and Broom 1955, see also Levitsky 1998). Value or value infusion is problematic because it can’t be measured quantitatively as is the case with stability (cf. e.g. Panebianco 1988: 49-68, Lindberg 2007). Level or weight of institutionalization is determined by four major indicators of organizations and its procedures, That four major indicators are adaptability, complexity, autonomy, and coherence. Adaptability is determined by situational challenges and the time period of an institution’s existence. Diverse situational challenges and difficulties enhance the life span of political organization which plays an important role emboldening of adaptability of an organization. Elaborating the age factor of an organization involved in attainment of adaptability, he highlighted evolving and dynamic functions of an organization as marker of adaptability. Such consistently attained adaptability will synchronize the suitability of an environment and responsiveness of a political organization. (Mainwaring 1998, Kuenzi and Lambright 2001, Randall and Svåsand 2002, Basedau 2007, Huntington 1968 and Dix 1992))

Autonomy can be premised on sharp boundaries of functions between different organizations. This independence in functioning doesn’t undermine the concept of coordination or interdependence among various organizations. It prevents organizations and their functions from undue influence of other organizations (Huntington 1968, Dix 1992, Randall and Svåsand 2002, Bendel and Grotz 2001). Undue influence of other organizations benefits and suits few individuals and such exercise of transgressed organizational function centralize the game of governance around individuals. Central position of individuals in the game of governance externalizes the organizations/actors and hence, fails to functionalize the aggregated interests of people at large.

Complexity is that range of features which confirm the diversity and sophistication in responsiveness and deliverance of a political organization. One organization and one function was the rule of simple societies. Today’s world is the globally complex and heterogeneous world. One organization with variety of functions can cater the pluralism of society. Such sophisticated deliverance requires range of subunits and subordinate bodies. Huntington (1968) underscored complexity as the marker which expands level of regulation. Besides, he by alluding to the case of the United States where diverse associations have assumed a mixture parts ever, considers that the dysfunctional status of an organization in the game of governance should be covered up by functionality of other organization, (Mainwaring 1998, Basedau 2007, Bendel and Grotz 2001, Huntington 1968 and Dix 1992). It can be done through different ways. First, one organization can push other organization to do what it is bound to do under the mechanism of check and balances. Second, it can facilitate the other organization by giving the functions of other organization a legal course to follow. Last characteristic of institutionalization is coherence in a political entity. Agreement among players working in same political association or group will expand the level of institutionalization. Diverse and spilling limits and functions are needed to be discussed and separated by the actors of same organizations to avoid confusion and chaotic flow of performance. Divergent tendencies within same organization can be multiplied if multiple organizations are going through the same problem. The ultimate state of institutionalization would be directionless and highly uncertain (Mainwaring 1998, Kuenzi and Lambright 2001, Basedau 2007, Dix 1992).

Acemoglu and Robinson (2012) strived to discover various reasons behind failure of nations situated at different areas of the world. Paths followed by different nations to attain the status of development are covered by them. Attribution of different statuses of developments to the historical paths of institutions in various nations has made the debate on institutions in global south more interesting and attractive. Political institutions and economic institutions are like two wheels of same chariot. Both types of institutions impact each other and build up the overall environment. Institutions are categorized into extractive institutions and inclusive institutions. Extractive institutions exclude majority of the society from the reception of uses of sources in the society and its distribution. Centralization of benefits and results of mobilization of resources in a society is major feature of extractive institutions. Whole game of governance is confined to few individuals/elites of the society and caters their interests. New ideas and constructive destruction through consistent inclusion of new individuals in the game is absent in extractive institutions. To the opposite, inclusive institutions function for multiple groups of a society. Pluralistic distribution of resources and its benefits through consistent inclusion of individuals with new ideas is the essence of inclusive institutions. Such institutions keep the doors open for new individuals to the game of governance. Such inclusivity keeps the pace of evolving dynamism of the political system at optimum level. This research will take the status of the Supreme Court of Pakistan into account of institutional engagement and encounters between political organizations. Institutional input of the Supreme Court of Pakistan in extraction and inclusion of the political system will expose the academic domain to inroads through which institutions can be strengthened and trusted.

Douglas (1993), Huntington (1968) and Robinson and Acemoglu (2012) weave an institutional framework in which the role of Supreme Court of Pakistan can be figured out. The research on activism on the part of the supreme

judiciary, since 2009, will pinpoint the restive areas of institutional path. Efforts to harmonize the restive areas of institutional path will usher the political system in institutional change and institutional development. Institutional development injects durability in the structure and function of governance. Synchronization between state, society and individuals strike major areas of governance such as rule of law, accountability, trust in institutions, constitutionalism and ways and means to bridge the gaps between formal and informal routes of governance. Main objective of the research is to clarify the status of the apex court as the guardian of constitution-written rules- in the game of politics and governance among various political organizations.

The role of the Supreme Court of Pakistan in institutionalization to strengthen the democratic structure for the promotion of good governance is dual with respect to time, situation and individuals with the authority of interpretation of the constitution of Pakistan. On the one side, it ratified the replacement of democratic order with undemocratic order through juggling with the constitution of Pakistan and on the other side it vehemently resisted and opposed any mishandling of the constitution. First type of role enlists cases: *Maulvi Tameezudeen Khan Case, The State Vs Dosso and Others, Nusrat Bhutto Vs Chief of Army Staff and Another* etc. The second type of role contains *Usif Patel and other VS Crown, Miss Asma Jilani Vs the Government of the Punjab, Nawaz Sharif Vs Federation of Pakistan* as examples. Such duality in approach of the Supreme Court of Pakistan towards maintenance of democratic setup as an ingredient of good governance and institutionalization creates doubts in the minds of students of Law and Politics. For removal of doubts and confusion, critical and in-depth enquiry of role of Supreme Court of Pakistan in establishment of institutionalization is necessary.

Through different kinds and natures of judicial activism are present but in Pakistan, in recent past, Lawyer movement divide two episodes of judicial activism. Since appointment of Iftikhar Mohammad Chaudhry in 2005 till beginning of lawyer movement, judicial activism was taking place at snail's pace. After lawyer movement and restoration of Chief Justice Iftikhar Mohammad Chaudhry, judicial activism took unprecedented momentum. Afterwards, General Pervaiz Musharraf on November 3, 2007 executed emergency in the country. As a result the then Chief Justice Iftikhar Mohammad Chaudhry was replaced by Abdul Hameed Dogar. The lawyer movement in tandem with agitation of civil society and political parties restored Iftikhar Mohammad Chaudhry to the seat of Chief Justice of Pakistan. After restoration of Chief Justice Iftikhar Mohammad Chaudhry in March 2009, momentum of judicial activism geared to upper level. At that level, Judicial as an institution became not only the attention of general public but also the pivot of Pakistani politics for quite long time. Independence of judiciary became the buzzword and catchphrase of Pakistani politicians on a large scale.

After the said restoration, the Supreme Court of Pakistan decided number of landmark constitutional and public interest cases. Overarching activism on the part of the Supreme Court of Pakistan triggered the debate between legal scholars and political scientists about the clash of institutions. Some focused on cost-benefit analysis and some on structure-function analysis. That variety of debate on the institutional role of the Supreme Court of Pakistan was due to its decisions on the cases of misappropriation of public funds; cases relevant to social issues such as rape; embezzlement in national treasury; killings without sanction of the state. The apex court decided all such cases in exercise of article 184(2) of the Constitution of Pakistan 1973.

2. METHODOLOGY

The Supreme Court of Pakistan is a political organization whose boundaries and jurisdiction, like other major organizations, have been clearly drawn in the Constitution of Pakistan 1973. Unlike other organizations, the institutional role of the supreme judiciary is apolitical in principles. Case selected for the research is National Reconciliation Ordinance (NRO). The best and legally authentic approach to test the institutional role of the Supreme Court of Pakistan through its judgment on National Reconciliation Ordinance (NRO) is to focus on the detailed verdict on NRO in context of political environment. Qualitative methodology will be adopted to do secondary analysis of the detailed verdict on NRO. This analysis will be generalized to the proactive role of the supreme judiciary from and during 2009 to 2012. Time limit of the research can be rationalized by spotlighted status of the judicial activism in debates about overall politics of Pakistan. During the time limit selected various political organizations were observed as confrontational about their constitutional domains. The time limit selected for the research suits to theoretical framework of institutions in this academic inquiry. During the period, centrality of institutions to the game of governance and overall politics made it essential to trace the path adopted by various political organizations. To probe the status of critical junctures and adopted path by the political organizations of Pakistan, it was imperative to construct the context in which output of various political organizations can be analyzed. For this purpose, newspaper articles and reports have been selected as auxiliary data to conduct research holistically. Such approach enabled the research to not only put the media as the fourth pillar of the state in debates

on institutional role of political organizations of Pakistan but also to reflect on the public opinion which reaches majority in society through print and electronic media.

3. NATIONAL RECONCILIATION ORDINANCE 2007 (NRO)

Government of Pakistan issued National Reconciliation Ordinance (NRO) on October 5 2007. The then ruling party Pakistan People Party (PPP), Mutahida Qaumi Movement(MQM) and other political parties, after due consultation, convinced the then President General (rtd) Pervez Musharraf to issue the National Reconciliation Ordinance(NRO). The points of agreement between stakeholders involved included ejection of Article 58 2(b) from the Constitution of Pakistan 1973, lifting up of ban on becoming third time Prime Minister of Pakistan and withdrawal of political cases against members of political parties. Such agreement gave rise to an understanding and a political environment which impelled Pakistan People Party (PPP) to legitimise the Presidential Elections held on October 6, 2007. Members of Pakistan People in provincial and national assembly gave legitimacy to the elections through their participation in the above mentioned elections. National Reconciliation Ordinance (NRO) swept all these issues under the carpet.

National Reconciliation Ordinance (NRO) introduces amendments to Criminal Procedure Code (CrPC). Inter alia other alterations, Section 494 of CrPC were amended through section 2 of the NRO. As the result of amendments, Prosecutor-Generals were taken over/ replaced by boards at provincial and federal level. The task assigned to constituted boards was to discuss and review the political cases registered between January 1986 and October 12, 1999. The scope of the task empowered them to probe the political nature of the pending cases. On the confirmation of nature of pending cases as political, boards would recommend the withdrawal of such cases. Such recommended withdrawal of the case would bring the case to concerned governments. Concerned government can exonerate the accused people. Structure of federal review board required a retired judge of the Supreme Court to lead and attorney general and federal secretary to assist him/her as a member of the board. At provincial level, review boards were led by retired judge of provincial high courts and assisted by advocate generals and provincial law secretaries. National Reconciliation Ordinance also altered the system of accountability. A special committee on ethics for recommendation of arrest of those implicated/accused in cases pertaining to accountability was constituted. Establishment of such a committee occurred as a result of alteration of Sections 18, 24 and 31A of the National Accountability Bureau (NAB) Ordinance through sections 4, 5 & 6 of the NRO respectively. Recommendation of that was mandatory for arrest.

Two segments of National Reconciliation Ordinance (NRO) were the major causes of friction at the Supreme Court of Pakistan. Segment 7 of the NRO enabled various individuals to get themselves out of various pending cases before different courts of law in the country against those who were occupying legislative, executive and bureaucratic offices, subject to the condition that such cases had been submitted before 12 October 1999. There were exemptions to open office holders highlighted in this segment. Such special cases included helpful social orders and money related and venture organizations. Extraordinary condition to any status of lawful body of evidence against public office holders was the acknowledgement of a supplication deal or wilful return of Chairman NAB. After narration of major features of NRO, it is simpler to reveal insight into different perspectives and countenances of NRO. It has three confronts which oblige investigation. To begin with, it has established angles identified with the lawfulness of the NRO with reference to different articles of the Constitution of Pakistan. These angles were discovered confrontational with the constitution by the Supreme Court of Pakistan. Next section will examine the institutional role of the Supreme Court of Pakistan in institutionalization during the time period selected for this research. The second edge from which it can be broke down is the political angle which impacts country's overall situation and can be anticipated but that is out of the extent of this study, yet will be touched upon in next passages comprising discussion of the recipients of NRO. Third edge is the societal angle which brings the attention towards the general effect on society as the advancing way of governance. Obstructive and destructive roles of the supreme judiciary will be discussed in the theoretical context of two cases. First case was related to the implantation of the judgment delivered by the Supreme Court of Pakistan on NRO. Second case was the Contempt of Court case which ended in the indictment of the then Prime Minister of Pakistan Yousaf Raza Gilani. Those two cases triggered tepid criticism on the transgression of constitutional domain by the apex court.

Ministry of Law and Justice publicised the list comprising the names of those who benefitted from promulgation of National Reconciliation Ordinance (NRO). Such public display of NRO beneficiaries made the case transparent. General public noticed the level and nature penetration of corruption in the society. Experienced and otherwise known as veteran politicians were included in that list.. The vast majority of them were incumbent legislators amid the hearings of the apex court on NRO. That list comprised, Sindh ex-Home Minister Zulfiqar

Mirza, who is additionally the spouse of National Assembly ex-Speaker Dr Fehmida Mirza, president's, ex-Defense Minister Chaudhry Ahmad Mukhtar, ex-Interior Minister Rehman Malik, Sindh ex-provincial Minister Agha Siraj Durrani, PPP's Secretary General Jehangir Badr president's nearby companion Wajid Shams-ul-Hassan, top bureaucratic assistant Salman Faruqi and numerous others. At the time of this list having been made public, these persons were holding the public representative capacities and expected to pass through due procedure of law to get themselves off the hook (Noorani, 2009). In the document released, including 8041 persons, 34 government officials were leading the list. They were indulged in criminal acts, for example, killings, endeavored homicides, balwa, misappropriation, defilement, and so on. The way of their criminal acts and the degree of misappropriation of money was considered as death blow to vacillating economy of Pakistan (Gishkori, 2009). Farooq Sattar had the capacity to get away from thirteen cases. Majority of those who were on the list, were facing one or two cases at different courts of the country (Ibid). The cases, closed under NRO, included two cases of Hussain Lawai and Haji Abdur Razzaq. The nature of the cases pending against them at the courts was criminal. Government Survey Board, constituted under NRO, recommended the closure of cases on June 26, 2008. Special court put the recommendation into effect on August 19, 2008. (Ahmed, 2006). Implementation of the judgment delivered by the Supreme Court of Pakistan in letter and spirit could have changed the course of future of abovementioned businessmen. All the benefits accrued to them under NRO could have reversed. (Ibid).

The public exchequer of Pakistan bore a huge loss. Reportedly, amount of Rs 165 billion, under NRO, have been doled out to waive off the loans. National Accountability Bureau revealed this data regarding the official amount of loss. (Noorani, 2009). Anyhow that misfortune appeared to me more than was asserted by NAB on the grounds that 1000 billion rupees were lost as the consequence of conclusion of different embezzlement cases according to official sources (Ibid). In particular cases, people succeeded to retain looted money of US\$1.5 billion (Rs122 billion) and Rs310 million individually, which unmistakably demonstrate the particular application of NRO (Ibid). Imposition of emergency of November 3, 2007 and other ordinances were challenged in case of Tikka Iqbal Muhammad Khan vs General Pervez Musharraf. Other ordinances included Provisional Constitution (Amendment) Order 2007, the Oath of Office (Judges) Order of 2007 and the President's Order No.5 of 2007. Supreme Court of Pakistan validated imposition of emergency and other ordinances in the said case (Daily Times, 15 December 2007). Chief Justice of Pakistan (CJP) Iftikhar Mohammad Chaudhry, after having been restored, reverted all of that alterations to pre-November 3, 2007 position (PLD 2009 SC 879). The said judgment pushed the legislations in question to parliament. Parliament increased the span of applicability of those legislations. 120 days were added to span of applicability of federal legislations and 90 days were added to that of provincial legislation (Ibid).

The matter of NRO raised in Standing Committee of the National Assembly on Law & Justice. In its first two meetings, held on 29th and 30th of October, 2009 members of committee didn't agree on what to do with National Reconciliation Ordinance (NRO). Majority of the members of the Standing Committee of the National Assembly on Law & Justice boycotted the proceedings on NRO. Conclusive result of the whole exercise of the said committee came to the screen on November 2, 2009. The committee recommended amendments to the bill for approval of NRO by parliament. However, the whole exercise came to zero when prior to approval of chairman of the committee Federal Minister for Law announced that the government was not going to pursue the status-quo of NRO. The Minister maintained that government disowned NRO. The major reason behind the withdrawal of NRO was lack of consensus among representatives of various political parties which were part of the deliberations on ultimate fate of NRO. The government in general and the committee in particular failed to secure required majority vote of 51% . Some members of ruling regime along with its allies went against NRO. Opposition parties including Pakistan Muslim League (Nawaz)(PML-N) and *Jamat-i-Islami(JI)* were dead against any conciliatory approach regarding NRO. It was clear that the environment of the legislature was not in favour of any concession about NRO. Henceforth, NRO embraced its natural death on November 28 2009. On November 28, 2009 NRO lapsed.

As a result of natural death of NRO, the issue came back to the Supreme Court of Pakistan. When the apex court started hearing the case government clarified its stance through the office of the Attorney General. Office of the Attorney General submitted in the apex court that government had no intention of defending the legislative status of NRO. Written submission of the Attorney General maintained that the federation had believed in the supremacy and strengthening of the Constitution of Pakistan, 1973. The written reply further stated that NRO was the product of dictatorial regime of the then President General Pervez Musharraf. At the later stage, during the course of proceedings, the same office of Attorney General of Pakistan pleaded that proceedings should be initiated and pursued against the beneficiaries of NRO. Here it is pertinent to underline the approach of the government towards the matter of NRO. Given the response of the government to the matter of NRO, it had to be scrapped for sure. The Supreme Court of Pakistan decided the ultimate status of NRO on December 16, 2009. The verdict observed that NRO was in complete violation of the Constitution of Pakistan 1973. It was laid that NRO was in confrontation to

articles 4, 8, 25, 62(f), 63(i)(p), 89, 175 and 227 of the Constitution. Therefore, the apex court declared NRO as null and void. Resultantly, proceedings against the beneficiaries of NRO had been revived. All of the cases which were disposed off under section 2 and section 7 of NRO against beneficiaries of NRO had been reopened and brought to the pre-October 5, 2007 status.

The judgment of the Supreme Court of Pakistan on NRO increased the burden on judicial skeleton of Pakistan. Reopening of cases against the beneficiaries of NRO demanded more time of the courts. All compartments of the government were directed to implement the judgment of Supreme Court of Pakistan by extending its full assistance to the concerned courts. In addition, all of that cases which were in embryonic stage of inquiry were also reopened. Any benefit, under section 31-A of NAB ordinance and section 6 of the NRO, accrued to anyone had been dismissed. Such reversal of legal statuses of the cases casted aspersion on the letter written by the Government of Pakistan which had withdrawn its position on laundered money of the then President Asif Ali Zardari. The Supreme Court of Pakistan found the writing of letter aimed at withdrawal of government's claim on the money in Swiss accounts as unconstitutional and violation of article 100(3) of the Constitution of Pakistan 1973. The apex court directed the government to revived its claim over the laundered money through due channel.

4. NRO JUDGMENT AND INSTITUTIONAL ROLE OF THE SUPREME COURT OF PAKISTAN

After the narration of developments on the issue of NRO at Parliament and supreme judiciary it is necessary to enquire the institutional role of the Supreme Court of Pakistan in the prism of institutional theories of North. C. Douglas (1993) and Samuel.P.Huntington(1968). Organizations such as parliament and judiciary and office of the president and ruling regime were players of the game. Institutions were rules. Rules could be written as constitution. Rules drive the direction, nature and state of the game. Huntington (1968) notes the intertwining relation between organizations and institutions. Organizations are main agents of institutional change. Institutional change comes through complementary or detrimental encounter between formal and informal rules. Informal rules in the case of NRO saga could be the approach of actors which was out of line with written rules-the constitution. Formal rules, in contrast, bring organization and cohesive core in structure and functions of involved in the game. It brings certainty, enforceability, reliability and trust of people in organizations and institutions. Increasing nature of these features increases the level of engagement between organizations and general public along the lines of institutions which ultimately increases the durability of system.

Huntington (1968) underlined the major reason of difference between the overall situation of governances at modernizing/developing and modernized/developed world. He attributed such differences to the different nature and statuses of institutions in two worlds. Absence of personality between formal and informal institutions strengthens the governance structure and function. Sharp boundaries between formal and informal institutions of a country inject stability to the system of governance as a whole. Stability bring certainty, cohesion, clarity and durability in a system. In this discussion of stale and durable institutions and trusted organizations Supreme Court of Pakistan occupies different positions before and after 2009. Pre-2009 judiciary didn't play the effective role in institutionalization and injection of stability and durability in the system. Sustained development was lacking in the path of judicial development before 2009. Major reason behind such unstable path of development was multiple military regimes. Military regimes impeded the course of democratic and judicial development. Here it is pertinent to mention that the Supreme Court of Pakistan adopted a submissive approach towards executive in democratic regimes. From this, it can be established that institutionalization by the Supreme Court of Pakistan was not depended upon military regimes or democratic regimes, rather it was dependent upon the overall institutional environment of the country. If at some stages, some of the judicial regimes tried to electrify the judicial system by resisting the unconstitutional interventions then such attempts were not consistent. NRO judgment provided the consistency to the path initiated by the Supreme Court of Pakistan when it delivered the verdict on July 31, 2009. Such consistency gave rise to stability.

Before pegging the contribution of the Supreme Court of Pakistan in the process of institutionalization, the concept of development warrants interrogation. Development meant the path of institutionalization as underscored by the Douglas (1993) and Huntington (1968). Assertive independence in deliverance of justice and verdicts in the cases in which multiple organizations are parties to a dispute, is one feature of institutional development. If disputes are dealt with along the lines of rules/institutions then it is another feature of institutional development. Lastly, apolitical system of deliverance of justice is a significant part of institutional development. Huntington(1968) has placed the edifice of governance on level of engagement between political institutions and actors. Variety of actors creates heterogeneity in any system. Divergent interests of various actors attempt to pull the system in divergent directions. Such divergences create complexity and make the requirement of sophisticated and dynamic institutions essential. Such dynamism and sophistication demands the anchoring of multiple tasks and duties on single

organization to cater the complexity and sophistication of the system of governance. In this whole game of sophisticating governance various actors gain different extent and magnitude of power. In attainment and exercise of the distributed power among various organizations, institutions play the role neutralizer and balancer. It rationalizes the dealing and encounters of various organizations in this whole game of governance. The constitutionally mandated role of the Supreme Court of Pakistan to resolve the issues/disputes between individuals and organizations draws the attention towards the original need of institution in society. Huntington (1968) underlined the discordance between various organizations for the attainment and exercise of assigned powers as the reason behind emergence of political institutions in a society. Henceforth, it can be safely deduced that imbalance between the distributed powers, allocated to various organizations, resist the development of institutions. The asymmetries between the extent of imbalance between various organizations/players clarify the different levels of governances in developed and developing countries. The judgment of the Supreme Court of Pakistan on NRO balanced the erstwhile imbalanced link between various organizations/players. By playing an assertive role in making the system accountable, it transpired the confidence in ordinary citizens about deliverance of justice and responsiveness of the system of governance. Judgment of the Supreme Court of Pakistan on NRO is clear manifestation of putting institutions at the centre of game of governance. For the first time institutions became the centre of discussion in debates on governance. Polity of Pakistan started delinking individuals from institutions. Impersonality became the requirement of the institutional governance. In its verdict, the Supreme Court of Pakistan preferred the constitutional collective of the country over vested interests of 8041 individuals and remaining population.

Huntington (1968) found strength of political organizations as an essentially important element for the improvement of governance or a political community. He noted the contingency of the strength of political organizations on scope of support and level of institutionalization. Scope of support is the multidimensional phenomenon. It manifests the level and frequency of engagement between the common citizens and political organizations. First, it shows how much and how long general public are in touch with political organization. Second, it shows the following of the written rules by actors-political organizations and common citizens- involved in the game. Institutions seem to be term of engagement and underpinnings of trust between organizations and people. Implicatively, following of institutions attracts and increase scope of support. Institutionalization, the second source of strength of political organizations, is the evolving process in which stability and durability are afforded to political organizations or players of the game. As discussed in the beginning, there are four major features of institutionalization: adaptability, complexity, autonomy and coherence.

Institutional role of Supreme Court of Pakistan becomes easy to analyze by exposing it to various features of institutionalization. The first feature of the process of institutionalization to test the institutional role of the Supreme Court of Pakistan is adaptability. Lawyer movement of independence of judiciary changed the political environment to great extent. Overall politics had been shaped around catchy slogan of independence of judiciary. Earlier, game of multidimensional and overall governance was tilted in favor of Pakistan Army as a disciplined and perceptively most trusted organization since very long. Restoration of the judges, as a result of popular Long March, added further to the dynamics of new environment. Politicization of the supreme judiciary was also new to politics of Pakistan and the game of governance. Opposition gave a tough time to treasury on the issue of restoration of judges of the supreme judiciary. Intermediary role of the then Chief of Army Staff(COAS) in convincing the then Prime Minister Yousaf Raza Gilani and the then President of Pakistan Asif Ali Zardari was another feature of multifarious politics of the country((Viewpointonline, July 30 2010)). The new multifaceted political environment required new response and function from various political organizations. The Supreme Court of Pakistan harnessed the new environment by occupying the space created by new dynamics. The judgment on National Reconciliation Ordinance (NRO) not only adapted the Supreme Court of Pakistan to new overall political environment but also introduced other political organizations to newly acquired assertive and active status of the supreme judiciary in the game of collective governance. One of main reasons behind adaptation of the supreme judiciary and other political organizations to new environment was popular support shaped by media hype. Later on, implementation case of NRO and the insistence of writing of letter to Swiss authorities for revival of Pakistan's stance on gave consistency to newly introduced adaptability. Constitution of monitoring committee on implementation of NRO judgment catalyzed the pace of institutional adaptability. Institutionalization was moving ahead along with such catalyzed adaptability.

Second feature of institutionalization is complexity. Various dimensions of complexity have been signified by the features of new environment in the preceding paragraph. Multiple changes made the game of politics and governance complex. Society and state, both were getting sophisticated. In that situation it was imperative for political organizations to come up with diverse and multipronged approach on short-term and long-term basis. Conventional performance of political organizations could have eluded political prospects. Popular despondency

regarding bad governance was decades old. In such a situation, institutional role of the Supreme Court of Pakistan through its judgment on NRO seem to be complex. Criticism of organizational encroachment can be countered by this argument of complexity which was required at that time to make the overall system adaptable and trustworthy. Implementation of NRO judgment indicated the complex inter-organizational role of the Supreme Court of Pakistan. Pushing the executive arm of the system for implementation could be underlined as complexity in the role of the apex court. The establishment of monitoring cell for supervision of implementation of the judgment on NRO was another face of complex role of the supreme judiciary. Such complex role on the part of the apex court can be noted as activism. The same activism, later on paved the way for attainment of further complexity in the shape of Nineteenth Amendment, establishment of new registries offices and branch offices and intervention of the active judiciary in the matters of governance. The volume of autonomy, attained by the supreme judiciary, can best be manifested in the string of its judgments related to NRO. Huntington (1968) underlined the significance of autonomy in the performance of organizations. It applies to the case of supreme judiciary in Pakistan for its judgments through which it secured considerable autonomy. The Supreme Court of Pakistan rejected the reconciliation of few individuals in the name of national reconciliation. Institutions –the written rules have been preferred over individuals. Through its judgment it internalized the institutions in the polity of Pakistan. It can be considered as a serious attempt by the apex court which put institutions at the centre of the game of governance and pushed individuals to coalesce them around institutions.

The Supreme Court of Pakistan changed its institutional path. Through such change long-followed institutional culture of bending to other political organizations had also been reversed. It seems that judgment on NRO and related cases proved to be critical junctures in the institutional development of judiciary of Pakistan. Legalist judgment of the supreme judiciary departed from the old path of bending before executive. Climax of NRO in the apex court struck sharp boundaries between organizations of the state. However, objective analysis of the case requires an interrogation of criticism on the role of the apex court by intelligentsia. Bottom-line of the multifaceted criticism is the abdication of the then Prime Minister of Pakistan through its verdict in NRO Implementation Case. Such criticism is based on the comparison between the independence and transgression. Independence of an organization doesn't necessarily mean that it has to bend other organizations. If executive, before the phase of judicial activism in the constitutional history of Pakistan, was not supposed to bend judiciary then the same logic applied to the allegedly encroaching role of the Supreme Court of Pakistan during the whole episode of NRO. Such episode created a conducive environment for later assertion of the Supreme Court of Pakistan. Such implicative assertion can be noticed in the success of the apex court in getting the 19th Constitutional Amendment approved from the parliament.

The judgment on NRO was delivered by the larger bench unanimously. The subsequent judgments' related to implementation of NRO judgment and contempt of court, were not delivered unanimously. NRO judgment was a unanimous judgment, but the other judgments relevant to NRO were not. There were number of shared institutional interests were independent of legalist observation of justices of the apex court. Independence from the undue control of executive, increase in powers of justices and prevalence of the Constitution were the shared institutional interests. Those shared institutionalism had been achieved by the justices of the supreme judiciary by trumpeting constitutional supremacy through constitutionalism. Elaborating the significance of institutions in any political community, Huntington (1968) linked Individual interest, public interest and institutional interests to each other. Fundamental reason of weakened institutions is compromise of rules of the game on individual's vested interest. Oppositely, surrendering individual interests in favour of functionality of institutions and institutional interests strengthen the institutions. Such strengthening of institutions fulfils the public interests. Case of Madison vs Murbury is one example in the constitutional history of the United States of America, wherein a historical decision preferred institutional interests. Such preference of institutional interests strengthened institutional power of The Supreme Court of America and ultimately cultivated public interest. Institutional interests have been secured to the extent that it, then never could have been snatched away. Same logic can be applied to the Supreme Court of Pakistan in the case of NRO. Institutional interests have been achieved by the apex court through its judgment in NRO Case. Balance between the organizational behaviours of judiciary and executive have been struck. Institutional interests in the form of this balance ultimately promoted public interests in Pakistan.

5. CONCLUSIVE ANALYSIS

Analysis of NRO from different angles has made it easy to squeeze out, the relationship between the Supreme Court of Pakistan and institutionalization. The Supreme Court of Pakistan, analytically, played its role in three ways: constructive, destructive and obstructive. Constructive role is that role which strengthened the institutions. Strengthening of institutions mean enforceability, application and trustworthiness. Empirically, constructive role has

been covered by preceding sections. Here, it is imperative to add few more points. Destructive role of the Supreme Court of Pakistan delineate all those steps which damaged the game of governance. It may include the encounters between organizations on the issue of institutions where encroachment upon each other's domain was clear. Such encroachment didn't leave organizations/players to focus on their objectives and duties and created confusion, in the minds of observers, about practical jurisdictions of the players in this game. Obstructive role is the implicative slowdown of the performance of other players and organizations. In this category of role others players and organizations don't feel comfortable and smooth to carry out their duties.

The Supreme Court of Pakistan, as a political organization, is the ultimate custodian of the Constitution of Pakistan 1973. It protects that document which seems to be the hub of jurisdictions of all the organizations. Boundaries and limitations of various organizations have been clearly envisaged in the Constitution of Pakistan, 1973. Pakistan Army, Parliament, Executive and Judiciary entail their powers and major features from the Constitution. This point increases the sensitivity of the judiciary's job. In other words, it not only interprets the constitution-the written rules but also interpret the rules related to other organizations. The judgment on NRO paved the way for setting the institutional pattern around the written rules of the game. Political organizations started drawing themselves around written rules as opposed to the earlier way of informal dealing. Example of this can be observed in the shape of debate on article 62 and 63 of the Constitution of Pakistan 1973, which state the eligibility and qualification of representatives of legislation and public office holders in accordance with the integrity of the member of legislature and public office. The debate on above mentioned articles arose during the implementation phase of the judgment on NRO. It remained on the screen and attention of the public for quite long time. Critics underlined such invocation of dysfunctional articles as mixing up of personal and public domains. This criticism requires interrogation. Is it necessary that if some parts of the Constitution of Pakistan, 1973 had not been taken into consideration by the apex court during interpretation, it should not be implemented or it should be ignored? Functionality of erstwhile dysfunctional articles of the Constitution has organized the pattern of dealings among organizations along the lines of written rules. It also lessened the gap between theories and practice. Overall ecology of the game of politics and governance started getting formal.

Constitutionalism is another feature of constructive role played by the Supreme Court of Pakistan. Constitution was prevailed and preferred over the perceptions about the democratic setup. Strengthening of the constitution means strengthening of all the institutions including that related to other organizations. Message given by the Supreme Court of Pakistan was that it is the constitution which is supreme and will prevail. It also means democratic setup was not damaged rather it was fortified because constitution and its enforceability is central to evaluation of any democratic setup. The judgment on NRO also touched upon various elements of good governance. Through this judgment the supreme judiciary mobilized the torchbearers of good governance by focusing on various attributes of good governance. It insured accountability and gave a clear message that no one is above law. Offices of the Prime Minister and the President were not spared during the implementation phase of the NRO judgment. It is a total different question whether intentions were to improve accountability or to derogate offices of the President and the Prime Minister. This research neither aims nor finds it possible to deduce empirical evidence from intentions.

Similarly, other ingredients of good governance were brought to the Centre of circle of priorities. Those ingredients include transparency, rule of law, functional and responsive legal system, participation etc. Transparency was established because media gave full coverage to developments regarding the cases heard by the apex court. Participation by general public came into operation when the apex court took extreme care of fundamental rights. General public remained mobilized throughout that period. Rule of law made it possible for the players delink individuals from the institutions. Arbitrary exercise of powers has also been blocked. It is accepted that judgment on NRO didn't bring any upside down change. The structure remained the same. It proved to be a major step towards initiation of the process of institutionalization and development of organizations. That initiated process of institutionalization and development involved accountability of unprecedented kind. Abdication of the Prime Minister of Pakistan speaks greatly about that. Whole episode of NRO was telecasted by media with such zeal that sense of participation was generated among the general public. Underlying participation was the role of the media in awareness and spread of information which gave rise to transparency. That transparency sensitized the mobilization among the general public and through virtual world people remained in touch. They participated through voicing their concerns on due platforms. With no denial of the fact that throughout this period of judicial activism general public didn't participate in any major development, it was observed that such voicing of concerns on due platforms shaped up the overall political environment. Incessant discussion of article 62, 63 and 2 of the Constitution of Pakistan opened up the way for ejection of old elites to create vacuum for new entrants who could qualify the test of above mentioned articles.

Here, it can be noted that an attempt to kick-start the phase of creative destruction was made. The judgment paved the way for entry of men of character and impeccable integrity. New faces with new ideas could have entered into the arena of politics, had stress upon the aforementioned articles been continued. New lot could have embarked upon the alteration of overall structure and function. Development in a positive direction could have started. The way the Supreme Court of Pakistan dealt with the issue of NRO, has electrified the legal structure of Pakistan. Such electrification made the legal structure responsive. Responsiveness, an integral part of the game of governance, countered the long-sustaining arbitrariness in the legal system. Such arbitrary-countering responsiveness can be observed in the detailed verdict on NRO. An autonomous and independent judiciary is quintessential to functional and deliverable legal system. The judgment of the apex court, delivered on July 31, 2009, and the one on NRO increased significantly in the freedom of courts in country vis-a-vis other organizations. Complete eradication of corruption will be premature and subjective inquiry in the light of the fact that the complete end of the corruption is not possible as no society on the earth can get away from the criticism regarding corruption depending on the definitions and sorts of corruption and secondly, corruption is a relative concept. Be that as it may be, it can be deduced from this case-study that NRO judgment demonstrated as a significant hindrance in the route of embezzlement, aggrandizement and corruption in future. The judgment on NRO broke the convention of arbitrariness in various organizations. Such breakage of unconstitutional convention can be witnessed through the way in which the apex court dealt with the issue of immunity of the President and the legislative status of ordinances of the President of Pakistan. Such mode of replacing old norms with new norms has blocked the way of self-serving practices in key organizations like judiciary. Exceptional treatment under the clauses of exemption has been modified through reinterpretation in the new context. Such exemption could have diminish the sense of equality.

The impacts of the judgment regarding NRO on the parliament are summed up as destructive role of the supreme judiciary. Though it is debatable that sticking to the judgment till its final implementation is tantamount to destructive role or not but the episode of implementation of the judgment on NRO is much trumpeted as destructive role among the circles of intelligentsia. Such depiction of the supreme judiciary in this whole episode as anti-democracy can be observed against the backdrop of overall political environment. Memo Commission and its proceedings, involving Pakistan Army as another organization and stakeholder, decreased the popularity of the then PPP-led regime. Later on, the matter went worse when the then Prime Minister of Pakistan revealed that the submission of affidavit by the spy chief and the Army Chief as illegal. Such worst state of affairs presented two organizations: Pakistan Army and the Supreme Court of Pakistan as allies against the parliament (Pak Tribune, January 12 2012; Khan, 2012). The perception among academicians and general public was getting dominant and increasingly acceptable that the judiciary and the armed forces had associated with each other against parliament given the historical record that what Armed Forces of Pakistan did in chequered constitutional history of Pakistan had been upheld by the judiciary. Then the media hype regarding implementation of NRO through invocation of article 190 of the Constitution further muddled the issue. It is pertinent to mention that the said article provides for the assistance of any organization to the court for implementation of its judgment but the apex court never mentioned the armed forces for implementation of its judgment. At the same time when the matter of immunity emerged there Supreme Court plagued the establishment of insusceptible nature of the office of presidents throughout the world. Justice Katju of Indian Supreme Court noted the President as synonymous to the symbol of federation. President being embodiment of federation should not be brought to court of law. By avoiding such appearance of the President at court in person or his office under trial political skeleton of the country can sustain.

Pakistan People Party (PPP) came into power after general elections held in 2013. Completion of tenure of government is considered as one of important essentials for the democratic setup. Focus of democratic government is required for most of the time on governance. But, during the PPP regime, popular politics centred the Supreme Court of Pakistan. Focus shifted from the issues of governance and other concerns to the point where obedience to the apex court became the legitimacy of the then regime. Judgment on NRO and its implementation phase embarked upon this path of shift. Nevertheless, excuse of getting stuck in materialisation of Supreme Court's directions on strictly legal grounds is not reasonable enough to escape the essentials of governance-the game in which the supreme judiciary is one of many players. However, in terms of execution of Supreme Court decisions, researchers have underlined the undeniable significance of support for the performers (exceptionally Supreme Court for this situation) involved in constitutionally embodied rules of the game. Implementation phase of the judgment on NRO signified the importance of public support Caldeira 1968, 1209-12; Murphy and Tannenhaus, 985-1023; Weingast 1997, 245-263). Media played the role of bridge to funnel the public support. With constrained institutional assets, courts are hence remarkably indigent upon the goodwill of their constituents for both backing and compliance. (Gibson, Caldeira and Baird 1998, 343-358). In nations where there is a setup of majority rule public support becomes more important for higher echelon of legal structure, which urges parliamentarians to give practical

shape to the decisions of the supreme judiciary. Failure to implement the decisions of the judiciary may affect the popularity of an incumbent regime in negative way. The point of popularity became increasingly significant when active judiciary is supplemented with active media. In popular governments where a supreme judiciary holds mobilized and active popular support, flouting the legal decisions may bring backlash (Vanberg, 1995; Leuchtenberg, 1995). Basically, the "electoral connection" assumes a part of executing mode of execution of legal decision (Mayhew 1974).

Role of the supreme judiciary in the process of institutionalization can be categorised in three comparative classes assertive role, submissive role, and constructive role (Vanberg 2001, 346-361). Destructive or otherwise known as assertive role implies the approach by the Supreme Court which is indifferent to the implications of its decision on other pillars of the state. These pillars include parliament, executive and other organizations. During exercise of such role the Supreme Court of Pakistan struck down those enactments which are contravention of fundamental rights (Ibid, 350). A constructive court creates a conducive environment for the smooth functioning of other organizations. It implies that such type of court, with cooperative attitude towards other organizations, facilitates the approval of statutes. It does not impede the process of approval of statutes at due organizations (Ibid). For this sort of court, maintenance of statutory law is preferable over envisioning the implications of its judgments on political system (Ibid). The apex court didn't play such role in deliverance of its judgment on the issue of NRO with exception of one stage at which court had sent it back to parliament and given considerable time to decide the fate of NRO. Rather, the predecessors of Iftikhar Mohammad Chaudhry Chief Justice can be found used to with it such role i.e. assertive or otherwise known as destructive role. Submissive role demands a court to adopt flexible attitude towards other organization. This role includes extreme sensitivity towards future implications of a judgment on judiciary, as an institution, itself. While playing such role the apex court during the deliverance of verdict keep the possibility and likelihood of implementation of judgment in its prior consideration. Under such consideration, court does not deal with the case at hand on purely legal grounds, to preserve respect for judiciary as an institution (Ibid). It can be safely observed that the Supreme Court of Pakistan adopted a middle way between constructive and destructive role or between assertive and submissive role. The endeavors of the apex court during the whole episode of judicial activism to preserve the fundamental rights of citizens; to ensure equality of all of the actors involved in the game of governance and respect of parliament as an institution can be summed up as constructive role of the supreme judiciary. On the other side, submissive role can be seen on three events. To start with, when the Supreme Court initially envisaged a way where the issue could have been settled within the parliament. Such initial supportive stance was never focused in the discussion of intelligentsia. Legislature didn't avail that opportunity and failed to reach consensus. The supreme judiciary demonstrated its submissiveness to other organization for the second time and avoided purely legalist approach when it directed the government to choose any of six options given by the apex court, for the implementation of the judgment on NRO in general and paragraph 178 of the judgment in particular. Such directions about choosing of an alternative showed the sincerity about the balanced institutional relations. The Supreme Court of Pakistan showed its submissiveness for the third time when the apex court gave the room to the Law Minister Farooq H Naek for consultative meeting for agreement on the draft of the letter to ensure clear implementation of paragraph 178 of the judgment on NRO. Therefore, sharp boundaries can't be drawn between assertive and submissive roles nor such roles can be constructive and destructive or democratic and undemocratic respectively.

6. RECOMMENDATIONS

Reconciliation must be adopted in the societies, passing through a wave of conflict and instability such as that of Pakistan. But its misuse to hammer out a consensus among the few individuals should be avoided and discouraged. Rather the reconciliatory process in general and in the political domain in particular should span expropriated class and expropriator class. Money of taxpayers should be protected at any cost. Such protection increases trust among various stakeholders and encourages investment of all kinds. Active judiciary and effective legal structure are essentials of such protection and subsequent trust. Hence superior judiciary should focus on various tiers of the judicial system and apply same assertion, demonstrated in NRO case, to all and sundry who are involved in funneling trillion of rupees to foreign countries. Neither parliament nor the judiciary is supreme. The constitution is supreme. It is a document which is an institution in itself. Implementation and compliance of constitution are determinant of the process of institutionalization. All organizations of any type must work in accordance with a constitution which will ultimately lead to institutionalization of all the organizations for delivery of services to people. Judicial activism is necessary for the governance structure of a country like Pakistan where the institutional power structure is imbalanced. Hence logic and line of action adopted by the Supreme Court of Pakistan

in case of NRO should be applied in all of major cases and same legacy should be passed on lower tiers of the judicial system to ensure accumulative constitutionalism, institutionalization and people-friendly governance.

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