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Abstract: *This article examines the links between democracy, economic development, and the separation of powers—with a focus on the 1973 Constitution of Pakistan. Under the 1973 Constitution of the Islamic Republic of Pakistan, there is a separation between the judicial, legislative, and executive organs of the state, yet there is evidence that the separation exists more on paper and less in reality. The interference of one institution in another's functions is not only constitutionally unwarranted but is also against the essence of democracy. The prime minister of Pakistan is allowed by the constitution to exercise all executive powers in the name of the president and to oversee legislation in the country. Due to political party discipline, legislative assembly members cannot delay any legislation proposed by their party leader. It shows there is a close link between the executive and the legislature that seemingly goes against the theory and practice of the strict separation of powers. The judicial history of Pakistan shows the paramountcy of the executive over the judiciary. Nevertheless, the judiciary, through judicial activism, including judicial review and suo moto measures of the Supreme Court, has also affected the distribution of powers between the executive, legislature, and judiciary in Pakistan.*

Key Words: 1973 Constitution, Separation Of Powers, Democracy, Economic Development, Political Parties

Introduction

“Power tends to corrupt, and absolute power corrupts absolutely,” so goes Lord Acton’s aphorism. Montesquieu (1689–1755) argued in his book, “The Spirit of the Laws” that it is a historical fact that power is abused, so in order to prevent the abuse of power and to ensure citizens’ political liberty, it is imperative that power is balanced by another power (qtd in Boucher & Kelly, 2009). The Separation of powers ensures a mechanism of checks and balances among three organs of the government vis-à-vis executives, parliament, and judiciary for effective governance as well as to ensure the civil liberties of citizens. In other words, none of the three organs of the government overstep into the constitutional powers of one another, which is essential for democratic development and the welfare of the public (Levi, 1976). The concept of separation of power was propounded by the famous political scientist and philosopher Aristotle in 320 B.C. in his famous book “Politics.”

The underlying reasons behind the separation of powers are the protection of public interest and/or to avoid despotism— that is, the subordination of public interest to the personal interests of the ruler or rulers. Aristotle’s book “Politics” is one of the earliest works that couch the issue in such a manner: He divides powers among the three pillars of the state and lays emphasis on the common interest of the people (Magill, 2000). The ideas as propounded by Aristotle was further developed by political social thinker such as Montesquieu, who developed the modern concept of separation of Powers. Baron De Montesquieu his famous book, the Spirit of the Laws (1734), discussed the principles of separation of powers followed by the check and balance system. Montesquieu of the view that each component of the state should have the

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power to check and balance the other organs of the state, and this scheme would ensure that no one would be in a position to dominate the other so that there is no centralization of powers in one person or a few, and that is how the political liberty of citizens would not be endangered (Craig, 2017). For him, the centralization of powers in one or a few people was contrary to justice. It undermines the “general spirit” of society, which is why he put forward “a pluralistic vision of political power” (Boucher & Kelly, 2009).

The framers of the 1973 Constitution of Pakistan had this pluralistic vision and division of political power, which is why the Constitution guarantees the separation of powers (Bazmi & Qureshi, 2021). Pakistan is a federal state with a parliamentary form of government in which powers are divided between the executive, legislature, and judiciary. This division ensures that no branch of government is too powerful to dominate the other two organs. The President of Pakistan and the Prime Minister of Pakistan lead the executive branch. The Prime Minister has the most power, while the President is ceremonial. The Prime Minister runs the government and appoints Cabinet members. The central legislature consists of the National Assembly and the Senate (Manning, 2010). The National Assembly passes laws, and the Senate approves or rejects them, while the Supreme Court is empowered to judge whether laws passed by the legislature are according to the essence and provisions of the Constitution (Shah Gilani et al., 2021) under its judicial review power (Gilani, 2019).

That said, there is growing evidence that suggests that the trichotomy of powers as enunciated in the 1973 Constitution is not problem-free and that the executive branch overpowers the other two branches—the judiciary and the legislature. So, the political system of Pakistan requires reforms and a transparent separation of powers (Levi, 1976).

Before discussing the functioning of the system of governance in Pakistan, it is apt to shed some light on the trichotomy of powers as envisioned and practiced in other states—especially the United States.

Theory of Separation of Power and the US Constitution: An Overview

The United States of America is frequently considered one of the oldest and the most stable democracies in the world. The United States of America is a model of a federal government in which powers are made constitutionally divided between the central and the federating units on the one hand and between the executive, congress, and judiciary on the other. The federal government has explicit powers and responsibilities as enunciated by the Constitution of the USA, whereas federating units have their own powers and responsibilities. Both governments are independent to a great extent in terms of their functions (Gilani, 2019).

The US Constitution provides three separate divisions of powers divided among the three main pillars of the state. The different organs are vested with different responsibilities, such as the legislative branch (Congress), the executive branch (the President and his administration), and the judicial branch (the Supreme Court and other federal courts). Each branch has its own distinctive powers and responsibilities, and the Constitution sets up a scheme of checks and balances to stop any one branch from becoming too powerful or infringing on the powers of another branch. The Constitution, therefore, provides a comprehensive mechanism whereby the powers of the organ of the state or counterbalanced by another branch or branches (Gilani, Rehman, et al., 2021).

In short, the US Constitution outlines the divergent powers and responsibilities of each division of government and establishes a scheme of checks and balances to guarantee that no branch becomes too powerful or violates the powers of the others. The theory of division of powers, as originally proposed by Montesquieu, is upheld through a system of checks and balances in which each branch of government is monitored by another. The US Constitution provides a complete mechanism for the Separation of powers and settles the boundaries among the organs of the state to exercise their authority within the defined limits as prescribed in the constitutions.

Overall, the separation of power is a tool to control the abuse of power, as “power is the ultimate aphrodisiac,” said Henry Kissinger once. There is an inherent tendency to abuse power. Given the possibility of such abuses resulting from human weakness, Locke thought that the separation of powers was essential to preventing them. He held the opinion that the legislative branch, which was paramount and could not delegate its authority to any other entity, received the original sovereignty from the people



(Grebnev, 2016). He also introduced mechanisms for interaction between the legislative and executive branches to prevent abuses of power.

The Separation of Powers in Pakistan: An Analysis

The constitution of Pakistan defines the legislative, executive, and judicial branches' roles and responsibilities. Parliament has violated the constitution and separation of powers in some cases. Parliament has exceeded its powers by encroaching on the judiciary. Parliament has passed legislation that undermines the judiciary's independence or limits court jurisdiction. This can prevent the judiciary from upholding the law and limiting executive power. Parliament has also overstepped by interfering in executive branch affairs. For instance, parliament has tried to micromanage or limit executive branch authority. This can prevent the executive branch from fulfilling its duties, which can harm the government. Parliament has also passed unconstitutional or separation-of-powers laws. The parliament has passed laws that limit the judiciary's powers or independence, violating the constitution. The Pakistani parliament has violated the separation of powers by overstepping its limits. This can prevent the judiciary and executive branches from doing their jobs, which can hurt the government. Parliament must respect the Constitution and uphold the separation of powers.

In contrast, the executive branch has been accused of overstepping its boundaries and violating the separation of powers, which is against the Pakistani Constitution. The executive oversteps its boundaries by interfering with judicial independence. The executive may try to influence judicial decisions or appointments to undermine judicial independence. This can hinder the judiciary's ability to uphold the law and limit executive power. The executive oversteps its boundaries by limiting legislative power. For instance, the executive may issue ordinances or executive orders that circumvent parliament and limit its power. This can hinder parliament's legislative duties, undermining democracy. The executive may also violate citizens' rights or limit their free speech. For instance, the executive may repress dissent or limit opposition parties or civil society groups. This can violate citizens' rights and undermine democracy and the rule of law. The Pakistani executive branch has been accused of violating the Constitution by overstepping its boundaries and violating the separation of powers. The executive must respect the judiciary's independence, the legislative branch's authority, and citizens' fundamental rights to uphold democracy and the rule of law (Gilani et al., 2022).

Separation of powers in Pakistan requires the judiciary to operate independently of the executive and legislative branches. The judiciary has violated the separation of powers and the Pakistani Constitution in some cases. By assuming the powers of the other branches of government, the judiciary may overstep its boundaries. By issuing orders or directives beyond its constitutional mandate, the judiciary may act as a legislator or executive. This can lead to the judiciary overstepping the other branches of government, undermining the separation of powers. Violation of judicial restraint is another way the judiciary can overstep. Judicial restraint requires judges to interpret the Constitution carefully and not overstep. However, Pakistani judges have been accused of judicial activism, where they use their power to promote their own agendas rather than apply the law objectively. The judiciary has also been accused of interfering with other branches of government. The judiciary may issue orders that hinder the executive or legislative branches. This can prevent the other branches of government from doing their jobs, which can hurt the government as a whole.

The Pakistani judiciary is supposed to uphold the Constitution and the rule of law, but its role is to uphold the constitutionally sanctioned separation of powers. To protect democracy and the rule of law, the judiciary must restrain itself and respect the other branches of government.

The 1973 Islamic Republic of Pakistan constitution clearly divided powers. The 1973 Islamic Republic of Pakistan constitution provides a trichotomy of powers, but it is time and necessity to define these powers in the most elaborative ways by setting strict boundaries so that neither branch of government interferes with others. The Supreme Court of Pakistan's *sou-motu* powers and writ of *Mandamus* under Article 199(1)(A) of the Constitution of 1973 have caused recent judicial interference in executive and legislative functions. The High Court and the Supreme Court of Pakistan have ordered the legislature to pass laws on specific issues, which is considered judicial overreach.

Below are some of the examples that demonstrate the trichotomy of powers and some of the challenges that it faces in Pakistan.

Separation of Power in Pakistan: An Overview of Dosso and Asma Jilani Cases

There has been a struggle going on between the executive and the judicial branches in Pakistan. There are two cases that cast light on the struggle. General Ayub Khan's martial law was challenged in the Supreme Court of Pakistan, and the case is popularly known as the State versus Dosso case, or simply, the Dosso case. Justice Munir, the then chief justice of Pakistan, justified the imposition of martial law by Ayub by inking Hens Kelsen's doctrine of necessity: "A successful revolution or coup d'état was an internationally recognized method of changing a constitution" (Asad, 2022).

In the year 1972 father of Miss Asma Jilani, i.e., Malik Ghulam Jilani, was taken into custody under an order from the Defense of Pakistan Rules 1971, article 32(i)(1), read with article 213 of the Rule, dated 22-12-1971. However, the government abrogated that order and substituted Martial Law Regulation No. 78 by Martial Law Administrator. The then government took a plea that the constitutional petition filed by Miss Asma Jilani was not maintainable when clause 2 of Removal of Doubt Provisional Order 1969 was taken into consideration. Justice Hamood-ur-Rehman, Justice Waheed-u-Din Ahmed, Justice Muhammad Yaqoob Ali, Justice Salah-u-Din Ahmed, and Justice Sajjad Ahmed Shah, who allowed the petition, through majority, set aside the impugned order of detention and the concerned quarters were directed to set Malik Ghulam Jilani and Altaf Gohar free. Moreover, the honorable bench also declared Yahya Khan's "martial law unconstitutional and incapable of being validated" (Siddiqi, 2013). The court decision was seen as a step in the right direction, as it would put a stop to the Doctrine of Necessity in Pakistan.

The Constitution of Pakistan, 1973: The Case of Article 58(2)(b)

This article—58(2)(b)— of the 1973 Constitution empowered the president to dissolve parliament. It was a kind of check on an unbridled prime minister, but it was abused during the decade of democracy (1988–1999). Mian Muhammad Nawaz Sharif and Benazir Bhutto were elected twice as prime ministers, but presidents Ishaq Khan and Farooq Ahmed Khan Leghari dismissed their governments using Article 58(2)(b), which greatly the progress of democracy in Pakistan. President Ghulam Ishaque Khan dismissed the elected government and cabinet in 1993 due to internal differences between then–prime minister Mian Muhammad Nawaz Sharif and the president, exercising his powers under Article 58(2)(B). Mian Muhammad Nawaz Shareef filed a petition in the Supreme Court of Pakistan. The Supreme Court ruled, with ten out of eleven judges, that the dismissal of the government by the president using Article 58(2)(b) was unconstitutional, so Nawaz Sharif's government was restored (Carolan, 2009). Benazir Bhutto's government was dismissed in the same manner in 1996 but never restored.

In 1997, President Muhammad Nawaz Sharif made the thirteenth amendment to the 1973 constitution, transferring all presidential responsibilities to the prime minister and making the president the ceremonial head of state. Mian Muhammad Nawaz Sharif became prime minister with a 2/3 majority. Pervaiz Musharaf deposed him in 1999 in a military coup. The coup was challenged in the Supreme Court. The supreme court's larger bench, presided over by Justice S.H. Riaz Ahmed, Justice Muneer A. Shaikh, Justice Iftikhar Muhammad Choudhary, Justice Qazi Muhammad Farooque, Justice Mian Muhammad Ajmal, Justice Didar Hussain Shah, Justice Hamid Ali Mirza, Justice Abdul Hameed Dogar, and Justice Muhammad Nawaz Abbasi, heard the case.

The Federation of Pakistan and their counsel defended the military takeover according to the doctrine of necessity. The petitioners challenged the emergency proclamation and General Parvaiz Musharaf's appointment as Pakistan's chief executive as unlawful. The petition was rejected; the military coup was justified as necessary, and Parvaiz Musharaf remained chief executive and later became president. Worse still, he was allowed to amend the Constitution as and when he wanted (Gilani & AlMatrooshi, 2016).

After gaining legitimacy, General Musharaf proposed the Legal Framework Order to reclaim all the powers of the president that the Eighth Amendment had taken away, making him Pakistan's most powerful president. Between 2002 and 2007, he issued 134 ordinances while the National Assembly remained slow and introduced just 51 policy measures, having little control over Musharaf. Nevertheless, the court got



more active, and Chief Justice Iftikhar Muhammad Choudhary used his *sou-motu* jurisdiction to challenge the unrivaled powers of Pervaiz Musharaf. The Supreme Court's decision against the privatization of the Steel Mill made Musharaf uncomfortable as he was not inclined to share power with anyone else. He called Chief Justice Iftikhar Muhammad Choudhary at the Army house, where all his other colleagues were sitting, and they tried to pressure the CJP to change his working style or resign. After his rejection again, the 1973 Constitution was put on hold, and an interim constitution was imposed. Chief Justice Iftikhar Muhammad Choudhary was dismissed, and his reference was forwarded to the Supreme Judicial Council under Article 209 (Cameron & Falleti, 2005).

The suspension of Iftikhar Muhammad Chaudhry was a contentious action that caused bitterness in the legal community and civil society. The 2007 deposition of Chief Justice Iftikhar Muhammad Chaudhry by then-President Pervez Musharraf sparked the Pakistani lawyer movement. The 2007 deposition of Chief Justice Iftikhar Muhammad Chaudhry by then-President Pervez Musharraf sparked the Pakistani lawyer movement. Lawyers and legal experts organized nationwide protests and rallies to restore Chaudhry as Chief Justice. Pakistani civil society, opposition political parties, and others supported the initiative as it gained momentum. Lawyers and legal experts organized nationwide protests and rallies to restore Choudhary as Chief Justice. Pakistani civil society, opposition political parties, and others supported the initiative as it gained momentum. The lawyers' pressure group used quiet, peaceful protests, marches, and sit-ins. The campaign used social media and the internet to raise awareness and support. Ultimately, the Sindh High Court Bar Association filed a petition challenging the President's deposition of Chief Justice Chaudhry, and the Supreme Court was pleased to restore him to his original position (Khan & Muhammad, 2020).

The restoration, however, brought a new era of judicial activism in Pakistan. Article 2(a) of the constitution makes object resolution part and parcel of the 1973 constitution, which enshrines the independence of the judiciary. The fundamental rights granted under the constitution cannot be protected unless the judiciary is independent of the executive. It is held in the case of Sharaf Faridi (12), followed by another case reported 13), that the judiciary must be made independent in their financial affairs. The judiciary, while acting as an independent and integral part of the state, pronounced many judgments that resented the executive and legislative powers of the state, and resultantly, a new area of judicial activism was started in Pakistan.

The 1973 Constitution of the Islamic Republic of Pakistan provides that the judiciary shall be an independent integral part of the state and guardian of the constitution as well as the fundamental rights of the citizens of Pakistan. These three branches, such as the Legislature, Executive, and Judiciary, shall be independent in the spheres of their business and shall not interfere with each other's functions, but it has been seen and observed that they are overstepping upon each other's powers, which has resulted in strong resentment among these three organs of the state. Though the 1973 Constitution of the Islamic Republic of Pakistan clearly provided the division of powers in a precise manner, there is a need for time and the exigency of hours that these powers should be defined in the most elaborative ways by fixing strict boundaries, as either branch of government should not interfere in the functions of others.

The recent judicial interference in the functions of the executive and legislative is purely due to the writ of *Mandamus* provided under article 199(1)(A) of the 1973 Constitution and the *sou-motu* powers exercised by the Supreme Court of Pakistan, as well as being the apex appellate court of the country provided under articles 184 and 185 of the Constitution (Gilani, Khan, et al., 2021). High courts, as well as the Supreme Court, issued directions to the legislative to make legislation over particular issues that are considered to be overstepping the powers of the legislative by the judiciary. Judicial activism in Pakistan has frequently been a controversial subject, with a number of people disagreeing that it has created a gap between the executive and legislative divisions of government. The judiciary's increasing exercise of *suo moto* on the grounds of national importance matters where the court takes cognizance of its own move without any complaint from either side on the grounds of national importance.

In this way, the other division of the government resented it a lot and considered it to be overstepping its powers. In the recent past, the apex court of Pakistan has dealt with cases of national importance, such as the qualification of the Prime Minister, and has disqualified them so that they cannot hold the office of

the Prime Minister, resulting in their removal from their office (Khan, 2016) that the judiciary's activism has bent an unevenness of power between the divisions of government, with the judiciary becoming in an authoritative position and the other branches losing their power. This has created a gap between the judiciary and the executive and legislative pillars of government. Supporters of judicial activism are of the view that the judiciary has the primary responsibility to ensure the enforcement of fundamental rights (Khan, 2016).

All this goes against the separation of powers. The executive feels constrained in the face of the judiciary, as high courts are using the writ of mandamus to give themselves more power. This is because high courts usually tell government officials to do things that normally fall within the jurisdiction of the executive, which the executive sees as interference in their domain. The recent judicial interference in the functions of the executive and legislative is purely due to the writ of Mandamus provided under article 199 (1) A of the constitution of 1973 and the *suo motu* powers exercised by the Supreme Court of Pakistan, as well as being the apex appellate court of the country provided under articles 184 and 185 of the constitution. The High Court of Pakistan, as well as the Supreme Court, issued directions to the legislative to make legislation over a particular issue, which is considered a direct overstepping of the powers of the legislative by the judiciary.

In this way, the very concept of the separation of power is being shattered by the three pillars of the state. Pakistan, being a federal, parliamentary form of government, provides for the division of powers between the federal and provincial levels as well as among all the important integral parts of the state. The very purpose of this concept is to avoid confrontation among the pillars of the state, as these conflicts may lead the state towards anarchy and the destruction of democracy and also invite other undemocratic forces to take over the state and its affairs by the promulgation of military rules and the abolition of the constitutions, which are considered sacred books in the democratic form of government.

Separation of Powers, Economic Development and Democracy in Pakistan

The executive is unequivocal about judicial interference in its domain. There is a link between the economic hardship of many Pakistanis and judicial activism. Judicial activism is another name for undue interference in the domain of the executive. The executive has evidence that the Supreme Court of Pakistan would issue restraining orders in the exercise of *suo motu* powers, which alarmed foreign investors who were wary of investing in Pakistan due to undue judicial interference in the affairs of the executive. Foreign investors demand comprehensive legal protection before investing in Pakistan. Investor businesses have a realistic fear that a stay order from any Pakistani court will flush their investments down the drain.

Furthermore, people lack faith in Pakistan's legal system due to excessively lengthy procedures for considering cases, appeals, second appeals, modifications, and leave to appeal before the Supreme Court. According to a recent Transparency International survey, Pakistan's judiciary ranks 128 out of 130 countries in terms of transparency and competence. Parliamentarians who spoke on the floor of the assembly and critically examined the judiciary's performance openly stated that Pakistan's judiciary enjoys the same rights and privileges as developed countries, but their performance is unsatisfactory. The case pending from the trial court to Pakistan's Supreme Court is growing rapidly, shaking the trust of Pakistanis in the whole legal system. So, judicial activism in Pakistan has badly hit the economy.

The executive of Pakistan believes that the 1973 constitution of the Islamic Republic of Pakistan vests all executive powers in them, but the High Courts and Supreme Court either exercise their powers in the name of writs of mandamus or in the name of public interest litigation and fundamental rights violations. The executive branch makes national policy, which the Supreme Court implements through *Suo Moto*. *Suo moto* power means "on its own motion" in Latin. Legally, it means a court or power can act on its own initiative without a grievance or petition. *Suo motu* command by the judiciary in Pakistan has been a bone of contention for politicians, lawyers, and civil society. The supreme law of Pakistan allows the judiciary the ability to take *suo motu* measures on matters of public concern to protect citizens' constitutional rights and prevent infringement.

The judiciary's use of *suo motu* powers in Pakistan has been criticized for meddling in the executive and legislative branches and using powers that are not in the constitution as an implied authority. Few



opponents believe that the court is more powerful than the legislative and executive branches since the Constitution does not require responsibility for its usage. Other schools of thought, especially those who believe in judiciary independence, believe that the judiciary is the last hope of reformation, progress, and prosperity for Pakistanis who have placed their hopes in the system and that only the judiciary can protect their rights as guardians of the constitution. The Supreme Court of Pakistan has taken *suo motu* action on important subjects in several instances.

So is the case of democracy in Pakistan. In this sense, three state pillars are destroying the separation of powers. Pakistan's federal parliamentary government divides authority between the federal and provincial governments and all significant state institutions. The goal of this concept is to avoid confrontation among the state's pillars, which could lead to anarchy, democracy destruction, and undemocratic forces taking over the state and its affairs by promulgating military rules and the abolition of the constitution, which is considered a sacred book in democratic governments. These are only a handful of the many happenings throughout Pakistan's 75-year history. Pakistan was founded on democracy and parliamentary governance, which protect citizens' rights. Laws that infringe constitutional rights can be overturned by the judiciary as ultra-vires of the highest law of the land. The law and constitution do not allow judges to propose legislation through their judgments. Pakistan's parliament and courts were subordinate to the administration; hence, the separation of powers was minimal. Since 1947, the executive power has been subject to the core concentration among all the governmental powers, and it has been shifted from one institution to another, destroying the democratic system of the country and making it undemocratic. A military ruler took power and got the Supreme Court of Pakistan to grant him legitimacy under the name of a doctrine. In addition, the military dictatorship violated the constitution by promulgating the illegal, unlawful oath under the Provisional Constitutional Order (PCO) and Legal Framework Order (Welford) and removing honorable judges who did not follow their orders, dividing judges' priorities and preferences.

According to a recent Transparency International survey, Pakistan's judiciary ranks 128 out of 130 countries in transparency and competence. Parliamentarians who spoke on the floor of the assembly critically examined the judiciary's performance and stated that Pakistan's judiciary enjoys the perks and privileges of developed countries but performs poorly. The case pending from the trial court to Pakistan's Supreme Court is growing rapidly, shaking Pakistanis' trust.

Conclusion

Separation of powers is a device whereby power is checked by another power with the aim to protect the civil liberties of citizens and to ensure the smooth functioning of the political system. There is a philosophical background to the trichotomy of powers. Aristotle enunciated forms of government in order to provide a good life to citizens. Montesquieu is considered to be a modern philosopher who clearly envisioned the division of powers in a state to put a stop to despotism in which public interests are subordinated to the private interests of the ruler or rulers. Pakistan, as a modern state, has a constitution that is based on the separation of powers. The framers of the 1973 Constitution were clear in their minds about the abuse of power if powers get concentrated in one or a few hands. That is why there is a complete separation of powers in the three branches of the state: executive, legislature, and judiciary, in theory, at least. That said, the line is blurred in Pakistan: The executive has been interfering in the jurisdiction of the judiciary, and the judiciary has been interfering in the domain of the executive since its inception. This interference greatly affects economic development as well as democracy in Pakistan. It is an unfortunate fact that power gets abused if vested in one or a few hands, which makes limiting power necessary for the smooth functioning of a system. The case of separation of powers in Pakistan is not clear cut, which is why the doctrine of necessity keeps visiting Pakistan when the holder or holders of power seek relief from the apex court in Pakistan. Hence, a strict trichotomy of powers whereby every organ of the state functions within its constitutional boundaries provides one of the durable solutions to the myriad of challenges faced by Pakistan today.

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