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## THE WAR OF JUDICIAL INDEPENDENCE IN PAKISTAN: A CRITICAL ANALYSIS OF LEADING POLITICAL CASES

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### ABSTRACT

With recent constitutional developments and restoration of judiciary in Pakistan, judiciary sought autonomy from other state organs including Parliament, which opened up another debate for legal scholarship. The Supreme Court, for various reasons, presumed itself as representative of the public will and challenged supremacy of Parliament. With qualitative research methodology, this research article aimed to investigate some of the leading political cases and examined how judiciary justified its stance of public representation and its accountability through public. Main objectives of this research are to examine judicial response to legislative efforts, which resulted confrontation between these two organs. In this context, the following cases have been exemplified: judicial investigation into Memogate affairs, the NRO case, Panama Papers Case, and controversy attached with Election Act, 2017.

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## 1. INTRODUCTION

After 2009, the Supreme Court exceptionally expanded the scope of Article 184 (3) and took cognizance of the matters ranging from the highest to the pettiest nature of cases, which helped it earn the title of 'people's judiciary'. The Court invalidated the NRO and directed corruption cases against President Asif Ali Zardari. The Court dismissed an elected Prime Minister for not writing to the Swiss authorities on the basis of contempt of Court. The Court while claiming its moral uprightness cultivated the judiciary's image as a guardian of the exploited people's interest. Consequently, the frustrated society, which remained vulnerable to discrimination, injustice, and political exploitation, appreciated and earned a good name for the judiciary, and the same turned out as a legal tool for judiciary's populist stance. Following Musharraf's regime, Parliament brought about constitutional amendment for upholding its supremacy and imposing modest constraints on judiciary, in order to prevent it from validating extraconstitutional actions. On self-conception of autonomy, the judiciary reversed most of these efforts. The Court not only asserted autonomy from the government, but also affirmed its role as an arbiter for deciding core political issues. For its operational framework, this research has been divided into the following segments: first part provided an overview of how judiciary emerged after its restoration in March

2009 and how it claimed itself of being representative of public will. In second part, judicial response to legislature has been examined. This segment explicated how judiciary undermined elected representatives at the cost of non-elective institutions. In this segment, some leading and most politicized cases have been discussed. In third part, self-conception of judiciary of public representation and its accountability discourse has been examined. In fourth part, the research at hand has been concluded with the findings that people have no active role in judicial accountability, which the Court claimed for its populist stance.

### 2. JUDICIAL ENTRENCHMENT AND FRAGILE PARLIAMENTARY SOVEREIGNTY

After Eighteenth Amendment case, judiciary asserted its autonomy both from Military and civilian government more rigorously than ever before. The Court asserted its autonomy more intensely to the parliamentary affairs, which adversely affected the civilian government. The following are worth-mentioning politicized cases: firstly, judicial investigation into the Memogate affairs. The controversy came to fore after the US raid on Osama bin Laden's compound, which was followed by an imminent threat of Military intervention to replace civilian government. On the President's behalf, Pakistan's ambassador to the United States, Hussain Haqqani, sent an unsigned memo to the US military's officials for preventing imminent coup. The news sparked heated debates across the board regarding mysterious correspondence and its treasonous nature.

Despite rejection of the allegations, Haqqani was not only forced to resign from his office, but also had to face parliamentary committee's inquiry constituted on directions of the Prime Minister. Meanwhile, Military also initiated investigations on its own, spreading rumors regarding imminent coup. The oppositions including the PML (N) approached the Supreme Court for Constitution of a Judicial Commission to investigate the matter. The Court directed Haqqani for not leaving Pakistan without considering security to his life. Further, he was not provided due process of law, which is violation of Article 10A of the Constitution. As per directions of the Court, Military was filing direct responses in the Court without proper consent of the government, which motivated the Court to probe into the matter. The Court, however, has not taken into account the government's investigation (Memogate Case: Kayani, Pasha Relies were Illegal, Implies PM. (2012)). The court while accepting the petition constituted a Judicial Commission on the pretext that the matter is associated with Fundamental Rights, having sufficient public importance (Watan party v Federation of Pakistan, 2011). The Court while confirming Haqqani's involvement in the memo held that memo's existence and contents has significantly endangered the sovereignty of the country and implicated with the petitioners' right to life, dignity, and information guaranteed by the Constitution.

Secondly, in the NRO case of December 2009, the Court directed the PPP government to write Swiss authorities to assist in the corruption charges against Zardari. The government's reluctance in implementation of the decision led to contempt of Court proceedings against the Prime Minister, which was followed by an exceptional order of his disqualification and removal (Khan. 2012). The government's delay in writing to Swiss authorities was not only meant to safeguard Zardari against legal exposure, but to safeguard political fallout of the PPP-led government from prosecution of its incumbent President and party co-chair person (Almeida, C. (2012)). In January 2012, after delay of two years in implementation of its directions, the Court articulated six unpleasant options, which included the contempt proceedings against the President and the Prime Minister, or leaving the matter with Parliament or with the people, the commission's constitution for monitoring and application of its verdict (Adnan Khawaja v State, 2010).

Finally, the court decided contempt proceedings against the Prime Minister who contended that the President, by virtue of his office, has immunity from criminal prosecution so he is constitutionally not allowed to write to the Swiss authorities against the President. In April 2012, the Court while rejecting the arguments convicted him and imposed a symbolic sentence lasting for about half minute (Yousaf Raza Gilani, 2012). Though it was believed that this sentence was an effort of the Court to yield the clash and let the political process to decide Gailani's fate. Nevertheless, opposition challenged the Speaker's ruling against not referring Gilani's disqualification from holding office (Article 63 (1) (g) of the Constitution of Pakistan, 1973).

In June 2012, the court not only overruled Speaker's decision, but also disqualified the Prime Minister with retrospective effect, the date on which he was convicted by judiciary, April 2012 (Muhammad Azhar Siddique v Federation of Pakistan, 2012). Like previous stances, the Court invoked same abstract of judicial autonomy and held that the Speaker's ruling had disregarded judicial autonomy and thereby ridiculed judiciary. Since restoration of judiciary, the Court's assertion to these kinds of autonomy is identical with the reprisal of its typical role to facilitate the subversion of elected governments as evident in Military regimes.

Similarly, the Court, in the Memogate case, preferred its own investigation over that of Parliament

and fundamental rights over national security. Asma Jahangir, Haqqani's legal representative, considered it a conspiracy against the ruling government for regime shifting. Military's unwillingness to oust the PPP government directly, instead utilized judiciary and opposition in order to sabotage the PPP indirectly (Khan, 2011). Even in default of any possible conspiracy, the whole episode depicts an institutional imbalance that how judiciary benefited Military at the cost of civilian government. In Gilani's case, the Court represented and imposed its authority like an arbiter of democratic righteousness, determined honesty of the legislator to hold office, and Parliament's internal affairs. Unlike its recognition in the earlier cases on the constitutional authority of the Speaker and the Election Commission over the issue of questions, this verdict amounted to abolish discretionary authority of the Election Commission as well as the Speaker regarding conviction of a Parliamentarian by a competent Court (Muhammad Azhar Siddique v Federation of Pakistan, 2012). In the instant case, the Court also held that as a result of conviction, disqualification will follow automatically, which is only subject to appellate Judicial Review (Kalhan, 2013). This unprecedented move replicates the President and the military during 1990s. The court provided services as an extra-parliamentary broker, in order to provide short-term benefit to the opposition at the expense of the governing party.

Both cases witnessed that the court intervened Parliament's internal affairs. The court, in Memogate case, refused to suspend its own investigation rather privileged its inquiry against Parliament's investigation. In Gilani's case, the court reviewed and overruled the Speaker's ruling and considered it beyond Parliament's internal proceedings. The Court declared that the matter is not precluded from Judicial Review (Muhammad Azhar Siddique v Federation of Pakistan, 2012). The Court also declared retrospective effect to Gilani's dismissal and directed the President to take necessary steps to ensure democratic process. The implications of both these cases were paternalistic in nature. Both the President as well as Parliament had not been trusted to carry out their own affairs without Court's overseeing authority (Ijaz, 2012).

Recently, in Panama Papers case (Imran Khan Niazi v Mian Muhammad Nawaz Sharif, 2017), the Court set another precedent. In order to investigate the panama papers controversy, the Court constituted the Joint Investigation Team (JIT), where two of the officials were from the Military Intelligence and the Inter-Services Intelligence. The Court disqualified the elected Prime Minister, on the basis of the inquiry report submitted by the JIT. The report declared three of Sharif's children as owner of the offshore companies suspected of money laundering. Based on the evidence collected by the JIT, the court directed the NAB to file corruption cases against Sharif and his family. The JIT reported that it has been secured evidence from the UAE, which not only confirmed Sharif's status as Board's Chairman of a Dubai based company, but also draw salary even after taking charge of the Prime Minister's office (Shah, 2017).

Previously, Sharif has been ousted twice from holding the Prime Minister's office: in 1993 through a Presidential Order and in 1999 through Musharraf's coup. In the instance case, turning of inquiry into an investigation about Sharif's moral character depicts the Court's intervention in political matters. Despite the fact that Sharif was not personally implicated in the Panama leaks and there was no evidence on record to justify his misuse of public office for private gains. The Court, nevertheless, disqualified him for hiding assets, not being honest, hence, failed to comply with the requirements of the Constitution (Article 62 (1) (f) of the Constitution of Pakistan, 1973) and Section 99 (1) (f) of the Representation of the Public Act (ROPA). As a consequence of the disqualification, Sharif has to step down as Prime Minister as well as party chief. The PML (N) government passed a bill and modified Clause 5(1) of the Political Parties Order (PPO) of 2002, which allowed Sharif to be re-elected as a President of the ruling party (Ghauri, 2017). This initiative of government was challenged under Article 184 (3) of the Constitution on the pretext that the matter is of public interest and related with the enforcement of fundamental rights. The petitioners alleged that it is contrary to Articles 62, 63, and 189 of the Constitution.

Most recently, Parliament passed Election Act, 2017, which sparked agitations around the country. The Act raised controversy regarding the nomination form (Form A), which Parliamentarians are required to sign as an affidavit regarding the finality of the Holy Prophet (PBUH). The Act replaced an affidavit with a declaration: the words "I solemnly swear" were replaced with "I believe" in the absolute and unqualified finality of the Prophet-hood of Muhammad (PBUH) as the last prophet. Further Section 7B and 7C (General Election Order, 2002), which is related with the status of Ahmedis, had also been omitted from the Act (Imran, 2017). Senator, Hafiz Hamdullah, pointed out the controversial provisions, which the government declared to be a clerical mistake and the Senate unanimously passed Election (Amended) Bill, 2017 by restoring the finality of the Prophet (PBUH) to its original form. The Amended Act incorporated Section 48A whereby status of Ahmadis etc remained unchanged. A Parliamentary Committee, headed by Raja Zafar-ul-Haq, was constituted to probe into the matter. The Committee released a report that has yet to be made public.

Despite the correction, the supporters of certain religious parties, Tehreek-i-Khtam-i-Nabuwat

(TKN), Tehreek-e-Labaik Ya Rasool Allah (TLY), and Sunni Tehreek (ST), started agitations considering it to be a deliberate act of conspiracy on the part of the government, which the latter had already deemed a clerical error and had subsequently rectified. A supporter of the TKN also challenged the controversy in the Islamabad High Court and contended the reversal of the controversial provisions in totality, dismissal of the Law Minister, Zahid Hamid, and strict actions against the responsible persons. The Court directed the protestors, who sit-in at Faizabad, Rawalpindi for about twenty-one days, to disband the protest. The Court declared the protest unlawful as ban has already been imposed on the public gathering in the city and there are certain designated places for such gatherings (Hassan, 2017).

As a last resort, the Court directed the district administration to evict the protesters and in case of default, the Interior Minister was warned of contempt of court for not complying with the court's orders. The court also observed that the protest's leaders had committed an act of terror by continuing their protest despite the court's order. Eventually, with the consistent failure of the dialogues with the protestors, the government launched operation to disperse the protestors. The government also required army for assistance to act in aid of civil power (Article 245 of the Constitution of Pakistan, 1973). Unprecedentedly, Army refused to comply with the government's directions on the pretext that it cannot use force against its own civilians (Text of Agreement Signed with Protesters, 2017). Consequently, the government turned towards negotiations with the protestors and had to bow and accept their demands: resignation of the law minister, probing of the controversy and prosecution of the responsible persons under relevant laws, release of the religious workers arrested since November 6, 2017 and dismissal of cases against them, and government shall pay compensation to the people for any lost sustained during the protest.

In this whole episode, Army became a mediator and facilitated the agreement between the government and the protestors. The Court severely criticized Military for brokering the agreement with the protestors and accused Army's Officials of an alarming reach into politics. The Court showed high concerns regarding Army's role as a mediator and declared it alarming because a senior Army Official, Major General Faiz Hameed, had signed the agreement with the protestors, and role of the Army's team in the pact (Guramani, 2017). Despite judicial criticism, Army had taken all the credit of public confidence and declared to be the real winner of the game because it has reinforced the image of the Armed forces at the expense of embarrassing the fragile civilian rule (Constable, 2017).

These recent developments are self-evident that how weak Pakistan's institutional structure is. In the recent controversial Election Act of 2017, which has already been rectified by the government and restored the provisions regarding finality of the Prophethood to its previous form in totality, both the Court and Military left no stone unturned to further undermine the civilian government. The Court unnecessarily pressurized the government and issued contempt notice against the Interior Minister for eviction of the protestors (Haseeb, & Imran, 2017). The Court's optional remarks regarding government's strategy for dispersing the agitators could not be justified by any means. The Court further politicized the government by passing adverse remarks that the government had made one person a scapegoat, in order to protect another person. Similarly, the Military also disregarded its constitutional role to act in aid of the civilian government, which is beyond its constitutional mandate. Despite complying with the government's directions to disband the protestors, Military facilitated accord between civilian government and the agitators, whose activities were already been declared by the Court as an act of terrorism. Like previous practices, Military earned itself a good title and entrenched its authority at the expense of civilian government.

In the recent years, the Superior Courts have increasingly asserted its autonomy. Nonetheless, it has poor track-record of upholding democracy against extraconstitutional and extra-democratic regimes: the Court has validated coups of 1958, 1977, and 1999 on the pretext of state necessity. After 2009, the Court, motivated by a populist approach, asserted its autonomy more aggressively not only against Military, but also against representative governments. The Court also received criticism for deposing Sharif without providing due process or fair trial (Article 10A of the Constitution of Pakistan, 1973) to prove his innocence. Interestingly, the previous government was interested to remove Article 62 and 63 from the Constitution during the drafting of the Eighteenth Amendment. Nonetheless, the PML (N) government opposed that and Sharif became the first ever Prime Minister to have been disqualified under this law.

In the instant case, the Court observed that as required under Section 12 (2) (f) of the Representation of People Act (ROPA) of 1976, Sharif had been dishonest for concealing his receivable salary, which he was required to furnish in the nomination papers of 2013 elections. Further, the Court directed the Election Commission to issue his disqualification notification with immediate effect and directed the President to take all essential constitutional steps to ensure maintenance of the democratic process. The Court also nominated a judge to supervise and monitor implementation of this decision and to oversee the proceedings conducted by the NAB

and the Accountability Court (Imran Khan Niazi v Mian Muhammad Nawaz Sharif, 2017).

### 3. JUDICIARY'S REPRESENTATION OF PUBLIC WILL AND ITS ACCOUNTABILITY MECHANISM: A SELF-CONCEPTION

The recent political and constitutional developments in Pakistan offer an interesting perspective to study that relationship between judicial decisions and public opinion (Friedman, 2009; Epstein, & Martin, 2010). In Pakistan, the Superior Judiciary has rapidly realized that the people of Pakistan have directly defined and legitimated their professional identities and role. This self-conception can be linked with the expansion of *sue motu* actions and public interest litigations, which took its roots even before restoration of judiciary (Kennedy, 2012; Kausar, 2013). This self-conception was further entrenched with lawyers' movement backed by public mobilization for restoration of judiciary and democracy.

Due to public mobilization against Military regime and favour of judiciary, the latter came to realize itself as legitimated by people and accountable to public who rallied and demonstrated their support (Walsh, 2012). With the restoration of judiciary in March 2009, this conception has significantly increased in the Court's opinions (Rumi, 2010; Siddiqi, 2012). For instance, Justice Asif Saeed Khan Khosa, in Gilani's contempt case draw a line from the will of the people to his contempt and conviction, without considering his status as parliamentarian and the Prime Minister of the state. He opined that people who have adopted this Constitution, not only have final ownership of the Constitution, but also its institutions. Primarily, people have the authority to punish an individual for contempt of court, created by people for adjudication. Likewise, anyone who disregards the Court's decision actually challenge public will and any sanction in response of such contempt is in fact awarded by people and not by the courts (Kalhan, 2013).

While disqualifying Gilani from the office justice Khawaja claimed that judiciary has coequal status with Parliament, both institutions reflects the will of the people (Siddique v Federation of Pakistan, 2012). While contesting the idea that only Parliament represents the populous will, Justice Khawaja asserted that the Court in exercise of contempt power disqualified Gilani. He observed that the Court had only performed its function to ensure parliamentarian's compliance with the public will, envisaged in the Constitution. This self-conception of judiciary can be comprehended with popular sovereignty, which is based on rationalization of constitutionalism, where judicial functioning is validated and restrained by a constitution reflecting the will of the people (Ackerman, 1989; Law, 2008). Simultaneously, the Court has challenged public representatives on the pretext of judicial autonomy and its authority on the same grounds extended to Military and its associated interests (Kalhan, 2013).

In order to design a theoretical framework for judiciary to reinforce democratic consolidation, judiciary is required to overcome at least two ironies which have been increasingly observed in the Superior Judiciary and characterized as self-conception of judicial sovereignty (Siddiqi, 2012): firstly, disconnection between the Superior Judiciary's priorities and other public needs in transition of its reforms. Logically speaking, a court animated by direct public legitimacy and accountability prioritize its work differently. To conclude differently, the court's excessive involvement, both in terms of time and resources, in dealing with high profiled political cases, which the Court is undertaking on the pretext of public will, may tantamount to neglect an uplift of an eroded judicial system on which the Superior Judiciary has ultimate supervisory responsibility (Siddique, 2010). Unlike the superficial tendency towards *suo motu* actions and upholding of welfare projects other than the administration of justice such as undertaking the construction of dam and establishment of dam fund, which has been the most recent example. Majority of people preferred and associated with the lower judiciary, which has been facing so many challenges: enormous cases backlog, corruption at root level, and other associated problems creating hindrances to expeditious justice. Similarly, within the superior judicial fabric, the excessive focus exclusively on political issues inversely affects other cases and essentially means that ordinary public cases barely appear on the Cause List (Asma, 2012; Sajjad, 2012).

Secondly, the nature of the Courts' legitimacy and its accountability mechanism is deeply concerned with the consolidation of democracy. Despite the fact that judiciary increasingly considers itself as representative of public will, there are so many justifications for negating the notion of judiciary's self-conception of public legitimacy and accountability discourse: people share no direct role in judges' appointment and removal. Considering the evolution of judges' appointment and removal mechanism, people even lack indirect role through their representatives. Further, public opinion cannot directly update or influence adjudication by any means. To counter this argument, judiciary might anticipate its inferring the populous will

from independent media. Nevertheless, the excessive media coverage and its vulnerability towards Military and its affiliates used the former as an imperfect proxy tool for utilization of popular will (Waseem, 2012). On this pretext, the popular will also gives license to media to register judicial criticism. In fact, judiciary sought to diminish minimum standards of judicial accountability by challenging and restricting its criticism in media (Kalhan, 2013).

In the given context, judiciary showed concern in stronger representative institution and their accountability. Judiciary is more inclined how to implement mechanism of judicial accountability, which could better legitimate the Supreme Court's role. Despite the fact, Parliament has never been subjected judiciary to any external constraints to ensure that the latter has been acting lawfully within its constitutional mandate. On the other hand, judiciary remained vulnerable to Military and its affiliates, which projects one of the institutional weaknesses. Up till now, Parliament has neither been successful in restraining judiciary nor made any such serious efforts. Unlike the Chief Justice's claims that negate supremacy of Parliament, no one in Parliament stood up against the Chief Justice (Almeida, 2012).

In order to safeguard the Prime Minister's office from the assertions of the Court's authority, government has adopted the Contempt of Court Act, which circumscribes Court's contempt authority. Nevertheless, the Court invalidated the Act and declared it unconstitutional. Further, the Court considered its constitutional authority to penalize and use contempt of court as an effective and unconditional tool to uphold its sovereignty. The Court concluded that the Constitution neither permits nor confers any right on Parliament to limit Court's contempt power and any such constraint amounts to violation of its dignity and sovereignty (Baz Muhammad Kakar v Federation of Pakistan, 2012). Without striking any balance or a rational compromise between judicial autonomy and its constraints, the Court's continuous assertion of authority could be a potential threat to the trichotomy of powers, which is the very foundation of the constitutionalism.

#### 4. CONCLUSION

To conclude with, public mobilization against Musharraf's regime helped realized judiciary that its professional identity and role is legitimated by people and is held accountable to people who demonstrated their support. In order to draw a theoretical framework for judiciary to reinforce consolidation of democracy, it must overcome two challenges: firstly, the judiciary needs to reconsider its priorities of public legitimacy and accountability. The Courts involvement in public interest litigations and high profiled political cases, undertaken in the name of popular will, necessarily amounts to ignore strengthening an eroded judicial system. The majority of people are concerned with the domestic courts, which are facing so many challenges: overly occupied with cases backlog, security threats to the judges and their families, corruption and influence to manipulate impartial adjudication. In the Superior Courts, maximum focus on the public interest litigation and taking cognizance of cases purely political in nature adversely affects the regular cases and integrity of the courts. Secondly, the Courts legitimacy and accountability is linked with the consolidation of democracy not with the individuals. There are various grounds for opposing the judiciary's self-conception of public accountability and legitimacy: public have no direct role in the judges' appointment and removal. Moreover, public opinion cannot influence adjudication. If judiciary anticipates inferring popular will from the independent media. The excessive media coverage and its inclination towards military can use it as a proxy tool for manipulation of public will.

As evident from the analysis of aforementioned cases, the Supreme Court of Pakistan is increasingly asserting its autonomy. Simultaneously, the functional space for the representative institutions has been reducing, which creates prospects of institutional confrontation. The Court seems to have been exercising jurisdiction beyond its constitutional mandate. Technically speaking, the court's jurisdiction is neither inquisitorial nor it is expected to supervise and monitor an investigation. The court while applying its self-conception of judicial autonomy kept on challenging the constitutional amendments and thereby compelled Parliament to amend the constitutional provisions in the light of its recommendations. The Court also entrenched its authority in the core Parliamentary affairs and deposed an elected Prime Ministers on the contempt of court, one for not writing the Swiss authorities against the incumbent President and the other one for not disclosing certain facts regarding his assets in the nomination papers of 2013 elections. Such type of judicial activism adversely effects consolidation of democracy, constitutionalism, and further undermines fragile democratic transition. However, the proponents of judicial activism appreciates the Court's interference in Parliamentary affairs, in order to maintain a reasonable control on the latter and keep it on the right track so as to avoid misuse of the legislative authority for personal whims at the expense of other state organs including judiciary. The elected representatives are not only answerable to people, but also to courts and can be prosecuted for their wrongs. Judicial autonomy and its surveillance to the other state organs makes the democratic transition

progressive and helps realize the governmental branches to demarcate their jurisdictional spheres. Keeping in view the two extremes of the judicial activism, the opponents and proponents, need of the hour is how judiciary would strike a fair balance between its own autonomy and its constraints.

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