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SCOPE OF JUDICIAL INTERFERENCE AND TEST OF MISCONDUCT IN REFERENCES AGAINST SUPERIOR COURT JUDGES IN PAKISTAN

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ABSTRACT

The Constitution of Pakistan, 1973 has guaranteed access to justice as a basic right to the people of Pakistan. Independence of judiciary is indispensable to ensure rule of law in the society and the absence of independent judiciary, this basic right merely remains as an illusion. To safeguard judicial independence, job security and the protection of judges are of utmost importance. This paper explores whether a reference filed before the Supreme Judicial Council (SJC) could be judicially reviewed by the Supreme Court to ascertain its legality and whether pre-reference proceedings can be struck down on the grounds of judicial review? Moreover, this paper lays down the historical perspective and general evolution of SJC. Generally, 'misconduct' is one of the grounds on which the proceedings by the SJC may be initiated against any Superior Court Judge, so this research aims at exploring the standards which constitute 'Misconduct'. Thus, to determine whether the facts of the case warranted filing of a reference on the grounds of misconduct against any Superior Court Judge, the substance of the term 'misconduct' needs to be carefully examined. Article 209 (5) of the Constitution deals with the grounds, which also included misconduct which is necessary for the removal of a Superior Court Judge. Therefore, any meaning ascribed to misconduct should be consistent with the object prescribed by the Constitution of Pakistan in Article 209.

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1. INTRODUCTION

Pakistan is the Islamic Republic based on Islamic Principles and Justice is a characteristic of faith in Islam. As it is narrated in Surah-an-Nisa, Verse 135:

“O You who have attained to faith! Be ever steadfast in upholding equity, bearing witness to the truth for the sake of God, even though it be against your own selves or your parents and kinsfolk. Whether the person

concerned be rich or poor, God's claim takes precedence over [the claims of] either of them. Do not, then, follow your own desires, lest you swerve from justice: for if you distort [the truth], behold, God is indeed aware of all that you do.”

As narrated above, justice has to be served whether that goes against kith and kin or the rich and the poor. It shows that the roots of Pakistan's currently established judicial system reach back to the medieval period and even before that. During this progressive evolution, various epochs, including Mughal Empire, British colonial rule, and post-independence periods, have passed. Overall, Pakistan's judicial system can be said to have an impact on the Hindu dynasty, the Muslim king's rules, and British colonialism. Therefore, the present developed judicial system has both influence of foreign doctrines and a tinge of indigenous culture. However, justice can only be attained if the judges stay aloof from their desires and serve the office equitably. The significance of an independent judiciary is also deeply embedded in Pakistan with the Constitution itself guaranteeing in its Preamble that:

“...the independence of the judiciary shall be fully secured;”

Even the Supreme Court of Pakistan in its various pronouncements on the meaningful working of the constitutional scheme of trichotomy of powers has repeatedly reaffirmed that the litigants and general public must have confidence and firm belief in the judicial impartiality and determination to serve justice. A prerequisite for these attributes is the guarantee of the independence of the judiciary, a fact which the court acknowledged in the case of Muhammad Aslam Awan v. Federation of Pakistan (2014 SCMR 1289), the relevant portion of which can be found in para-2, which is reproduced as under:

“Judicial independence both of the individual Judge and of the Judiciary as an institution is essential so that those who bring their causes/cases before the Judges and the public, in general, have confidence that their cases would be decided justly and in accordance with the law. Judicial independence is one of the foundational values of the Constitution of the Islamic Republic of Pakistan which is based on the trichotomy of powers in which the functions of each organ of the State have been constitutionally delineated. The very Preamble of the Constitution pledges “wherein the independence of the judiciary shall be fully secured”. The Constitution makers conferred this independence because they wanted the Judges to “do right to all manner of people, according to law, without fear or favor, affection or ill-will” (Oath of office of Judges). The fundamental rights guaranteed under the Constitution cannot be secured unless Judiciary is independent because the enforcement of these rights has been left to Judiciary in terms of Articles 184(3) and 199 of the Constitution and the relevant law. Judiciary has not been made part of the Executive or the Legislature (Article 7). The separation of Judiciary from the Executive was made a Constitutional mandate (Article 175(3)).”

The fundamental right of the general public is the derivative right of the independence of the judiciary. This right is an essential prerequisite for the enjoyment of, inter alia, the principal fundamental right to access justice which is guaranteed to the people of Pakistan by Articles 4, 9 and 10-A of the Constitution of Pakistan, 1973. The Supreme Court of Pakistan in a case titled *Sh. Riaz-ul-Haq v. Federation of Pakistan* (PLD 2013 SC 501) observed that “access to justice for all” is unchallengeable, a right is given to all in Article 9 of the Constitution and is also included in the “due process of law”.

It will be useful at this stage to consider in greater detail the independence of the judiciary, in the absence of which all other facets of the right to access justice essentially become redundant. Indeed, the constitutional necessity of an independent judiciary for providing such access to justice to the public has been elaborated succinctly in the case of Chief Justice Iftikhar Muhammad Chaudhry v. President of Pakistan (PLD 2010 SC 61), wherein it was declared that:

“I would, therefore, conclude and hold that access to justice is a Fundamental Right which the Constitution has guaranteed to the people; that the existence of an independent and vibrant judiciary is indispensable and crucial for the enjoyment of the said constitutional assurance and in the absence thereof, this right would be a mere illusion; that without security to the Judges of the Superior Courts vis-a-vis, inter alia, their service and the tenure thereof, the independence of the judiciary would be a mere delusion and a chimera;.....”

Thus, two crucial points emerge from the above-quoted passage:

- i) Firstly, it holds that any unlawful interference with Article 179 of the Constitution regarding the tenure of judges of the superior court and their age of retirement and any illegal bye-pass of the mechanism set out in Article 209 of the Constitution will constitute a breach which in itself would interfere with the right of access to justice.
- ii) Secondly, it affirms that although each individual Judge is guaranteed the right to be independent by

the Constitution, in essence, it is the judiciary as a whole whose independence has to be secured and protected.

iii) The Constitution ensures not only the independence of the judiciary but also ordains that every individual of the society enjoyed equal protection of the law and accordingly upheld the rule of law. This being the constitutional norm and the rule for the collective good, a Judge is not considered as an exception to this general rule.

1.1 Research Methodology

Research design is meant to define the structure of the study and helps to gather data on the topic under exploration (Kathuri & Pals, 1993). Moreover, it also leads the research in a specific way (Crotty, 1998). The present paper adopts an exploratory research design. Qualitative research has been adopted for this study to get a purposeful and meaningful understanding of the topic under consideration. It is believed that this method of study will provide deep insight into the legal issues (Creswell & Poth, 2017).

1.2 Research Questions

1. Whether a reference filed before the SJC could be judicially reviewed by the Supreme Court in order to ascertain its legality and whether pre-reference proceedings can be struck down on the grounds of judicial review?
2. What are the standards for the 'Test of Misconduct' as it is one of the grounds on the basis of which proceedings are initiated by the SJC against a superior court Judge?

2. LEGAL FRAMEWORK

SJC (Council) is an exclusive forum that can examine the conduct of a superior court Judge and decide that whether the said Judge is fit to be retained as such. In this regard, in the case Khan Asfandyar Wali and others v. Federation of Pakistan reported as PLD 2001 SC 607, it was observed by the Supreme Court that accountability in the system is the most needed pre-requisite. In case titled Zafar Ali Shah v. Pervaiz Musharraf (PLD 2000 SC 869), it was re-emphasized that judges of the superior courts cannot be removed without resorting to the procedure prescribed by Article 209 of the Constitution of Islamic Republic of Pakistan, 1973. ("Constitution")

The essence of Article 209 of the Constitution is that on one hand, it described the composition of the SJC (Council) itself whereas, on the other hand, it laid down the facts which give jurisdiction to SJC for its functioning. In this regard, Article 209(5) of the Constitution has guided that if the council or the President have formulated their opinion that a specific judge is not fit to serve in his office either due to mental or physical sickness or he is guilty of misconduct then the President must give direction to the council to inquire into it or the council also possess the right to look into the matter itself without any directive order.

Article 209 thus serves the dual purpose as on one hand it provided a secure cushion to the Judges of the Superior courts to be exclusively judged by their own peers whereas, on the other hand, it holds them accountable while also providing the mechanism for their removal.

The sanctity and uniqueness of the Council are enhanced by its composition as it is composed of three senior-most Judges in the Supreme Court besides two senior-most Chief Justices of High Courts of the country (ref: Article 209(2) of the Constitution). The significant impact of the composition of SJC on the removal process of Judges was indeed acknowledged in a case titled The President v. Justice Sheikh Shaukat Ali reported as PLD 1971 SC 585 wherein it was held that being judged by the peers provided protection to the judges as they understand the difficulties and problems of the fellow's judges.

To further explore the objects and purposes of Article 209, we may first refer the case of Al-Jehad Trust v. Federation of Pakistan (PLD 1996 SC 324), wherein Justice Manzoor Hussain Sial observed that:

"Undoubtedly, Article 209 guarantees the tenure of office of a Judge and explicitly secures the independence of Judiciary, which is dominant intent of the Constitution..."

The second case is of Syed Zafar Ali Shah v. General Pervaiz Musharraf (PLD 2000 SC 869) wherein the Supreme Court was pleased to observe as under:

"Clearly, the Judges of the Superior Judiciary enjoy constitutional guarantee against arbitrary removal. They can be removed only by following the procedure laid down in Article 209 of the Constitution by filing an appropriate reference before the Supreme Judicial Council and not otherwise."

3. WHETHER A REFERENCE FILED BEFORE THE SJC COULD BE JUDICIALLY REVIEWED BY THE SUPREME COURT IN ORDER TO ASCERTAIN ITS LEGALITY?

In case *Federation of Pakistan v. Muhammad Akram Sheikh* reported as PLD 1989 SC 689, it was observed that Supreme Judicial Council has exclusive jurisdiction to decide whether or not any action on the part of a Judge falls within or outside the ambit of the Code of Conduct framed by the Supreme Judicial Council. However, in Chief Justice Iftikhar Muhammad Chaudhry's case (PLD 2010 SC 61), it was held that the constitution of Pakistan does not provide the status of the court to the Supreme Judicial Council though it has been created by the court itself. Thus, the Findings of the Supreme Judicial Council and its report to the President are only "recommendatory in nature".

In Justice Shaukat Aziz Siddiqui's case (PLD 2018 SC 538), it was further held that the proceedings before the Supreme Judicial Council are of fact-finding Inquiry and its findings being recommendatory in nature did not enjoy the status of a right determining Judgment by a court which per se finally enforceable or executable. Thus, SJC (Council) itself could not remove a Judge on the basis of its findings but any conclusion drawn had been bestowed with an element of quietus i.e., finality.

Subsequently, in a case titled *Asad Ali v. Federation of Pakistan* (PLD 1998 SC 161), it was held that remedy under Article 209 of the Constitution of Islamic Republic of Pakistan, 1973 cannot be equated with the proceedings filed under Article 199 (1) (b) (ii) to challenge the unjust appointment of a Judge of Superior court even if it is unconstitutional.

Considering the aforesaid aspects of the nature of the jurisdiction of SJC, initially, the Supreme Court of Pakistan in Chief Justice Iftikhar Muhammad Chaudhry's case reported as PLD 2010 SC 61, observed that Supreme Judicial Council is subject to the constitutional jurisdiction as it has been omitted from the protected arena of Article 199 (5) of the Constitution. However, subsequently realizing that any judicial interference stifling the very function which the Constitution has assigned exclusively to the SJC (Council) would be violative of the constitutional scheme provided by Article 211 of the Constitution of Islamic Republic of Pakistan, 1973, the Supreme Court in Justice Qazi Faez Esa's case (PLD 2021 SC 1) was pleased to observe that allegations made against a sitting Judge could only be proved or disproved before the SJC (Council) and not before the court through a judicial pronouncement.

Thus, the Supreme Court held that judicial review of any reference before the SJC (Council) or determining its legality would set a dangerous precedent besides deviation from the constitutional scheme devised for the accountability of the Judges of the superior judiciary. However, further study would reveal that this principle of non-interference is not absolute in its nature and is subject to certain exceptions prescribed by the court itself.

4. CAN PRE-REFERENCE PROCEEDINGS BE STRUCK DOWN ON THE GROUNDS OF JUDICIAL REVIEW?

As discussed earlier, Supreme Judicial Council has exclusive jurisdiction to examine reference and to determine the conduct of the Judges of superior courts. This jurisdiction of the Council is subject to the conditions prescribed by Article 209 (5) of the Constitution. However, none of the proceedings once before the council can be called to question in any court as per Article 211 of the constitution of Pakistan, 1973. However, the question is that although any judicial interference or review of any reference may set a dangerous precedent besides deviation from the constitutional scheme, but whether this general rule of non-interference is absolute or is it subject to certain exceptions. In Qazi Faez Esa's case (PLD 2021 SC 1) it was held by the Supreme Court that all the proceedings and steps taken before the matter landed before the Council escape the immunity under Article 211 of the Constitution. Thus, all the acts preceding the proceedings before the Council are not hit by the ouster clause of Article 211 and are subject to standard judicial reviews like any other administrative or executive act on the grounds of substantive illegality, procedural impropriety, and decisional irrationality.

It has already been elaborated upon that Article 209 bars the questioning of the proceedings before the council, or the report of the president to remove the judge. However, the Supreme Court itself has described exceptions to this general rule while further holding that where the removal of the Judge was without jurisdiction, mala fide or coram non iudice, a limited judicial review on the said three grounds is not affected by Article 211 of the Constitution, as no ouster clause could keep the actions taken without jurisdiction, mala fide or coram non iudice beyond the scrutiny of the constitutional courts.

The upshot of the above discussion is that although any judicial interference in the exclusive domain of SJC

was generally held as violation of the bar contained in Article 211 of the Constitution, the said general rule is not absolute in its nature as pre-reference proceedings were held as amenable to standard judicial reviews like any other administrative or executive act. It is only the proceedings before the SJC which were generally held as barred by Article 211 of the Constitution whereas even in cases of consequential removal of a judge, judicial review was held permissible on the grounds of coram non judge, mala fide or without jurisdiction. Thus, the scope of judicial review in cases of pre-reference, during reference proceedings or post-reference situations has not been absolutely curtailed and the powers of the Supreme Judicial Council have been marginalized to a greater extent.

5. STANDARDS FOR THE ‘TEST OF MISCONDUCT’ FOR ASSUMPTION OF JURISDICTION BY THE SUPREME JUDICIAL COUNCIL

Article 209 (5) of the Constitution, 1973 has generally laid down those facts which give jurisdiction to SJC and is the basic provision dealing with the removal of superior court Judges. Interestingly, this provision although prescribed the word ‘misconduct’ it does not define the word ‘misconduct.’

The Constitution of 1956 through its Article 169 initially used the word ‘misbehavior’. In Justice Akhlaque Husain’s case reported as PLD 1960 SC 26, the Supreme Court interpreted ‘misbehavior’ as implying ‘misconduct, that is to say, conduct which is unbecoming of a Judge or renders him unfit for the performance of the duties of his office, or is calculated to destroy public confidence in him, as no other conduct, howsoever infamous or scandalous or whatever defect of character it might disclose, can ever be a ground for his removal’.

Subsequently, the term ‘misbehaviour’ was replaced with ‘gross misconduct’ through Article 128 (5) of the 1962 Constitution. Accordingly, in Justice Sheikh Shaukat Ali’s case (PLD 1971 SC 585) when it was contended that it is only when a Judge is guilty of misbehaviour while discharging judicial functions that he may be removed and there could be no misconduct within the meaning of Article 128 of the 1962 Constitution, and if the judge be guilty of misconduct, however scandalous or infamous, if that conduct has no reference to his judicial functions, he could not be removed, the Supreme Court held that:

“.....a Judge would be guilty of ‘gross misconduct’ even if he joined a partnership firm as a sleeping partner or continued even after elevation to remain partner of such a firm..... In this regard, a greater degree of propriety is demanded from a Judge and he should not only avoid any action which is improper but should also avoid doing anything which might even give the appearance of impropriety.”

As stated earlier the word ‘misconduct’ has nowhere been defined in Article 209 (5) of the Constitution we are constrained to refer to the Code of Conduct (CoC) framed under Article 209 (8) of the Constitution. Astonishingly, CoC also does not attribute any specific meaning to the term ‘misconduct’. However, it generally prescribed the norms and standards of good judicial and personal behavior expected from Judges. It means that any conduct which conflicts with the mandated norms in the CoC can attract scrutiny for possible misconduct. For instance, the CoC observes that the prime duty of a Judge of the Superior Courts is to present the image of justice before the public (ref: Preamble of CoC). It also makes reference to the oath of the Judges and their solemn duty to uphold and submit to the Constitution and the law (ref: Preamble of CoC). Therefore, simply put, the CoC expects that Judges will conduct themselves with integrity, propriety and dignity both in their public as well as private lives and will not engage in any controversy. It thus becomes clear that CoC laid down the general guidelines for the superior court Judges to highlight the ideal qualities. Consequently, the conduct that would go against these qualities will be considered as misconduct. However, CoC itself is also silent about the actual meaning of misconduct.

This position leads us to Enquiry Rules, 2005, framed by the SJC itself. The procedure for the effective performance of SJC to conduct proceedings and to exercise its jurisdiction according to the Rules of 2005. Rule 3(l) of 2005 Rules thus described ‘misconduct’ as under:-

- i) conduct unsuitable of a Judge
- ii) goes against the Code of Conduct issued under Article 209(8) of the Constitution of Islamic Republic of Pakistan, 1973
- iii) is either inefficient or has stopped being efficient now.

The Rules of 2005 have been affirmed in case titled Justice Shaukat Aziz Siddiqui v. Federation of Pakistan (PLD 2018 SC 538) wherein the contention was raised that constitution did not grant any rule making power to the SJC, therefore, the Supreme Judicial Council Procedure of Enquiry Rules 2005, formulated by the Council for its procedure is ultra vires the Constitution, the Supreme Court was pleased to hold as under:

“.....The aforesaid leaves no manner of doubt that where the Constitution creates a forum (SJC) vested with the jurisdiction of accountability of the Judges of the Superior Courts and holders of other high Offices as mentioned in the Constitution or the law, such forum (SJC) has implied and ancillary power to give effect to the mandate of the Constitution, more particularly, by devising its own procedure.”

Finally, the Supreme Court of Pakistan in Justice Qazi Faez Esa’s case (PLD 2021 SC 1) was pleased to observe that threshold that constituted ‘Misconduct’ for the Judges of the superior courts should manifest the intent and spirit of Article 209 of the Constitution. ‘Misconduct’ does not mean that trivial indiscretions or infractions of law by Judges or any minor shortcomings in their personal lives render them liable to removal proceedings. It is for the protection and integrity of the judicial institution by allowing for the removal of Judges whose conduct without constituting a violation of a prescribed law was so improper that it rendered such Judges unfit for holding judicial office. Accordingly, the standard for the commission of misconduct must not be so high that it was impossible to allege thus rendering Judges unanswerable for their conduct. On the other hand, the threshold for misconduct must also not be so lenient so as to become a weapon in the hands of disgruntled litigants. Thus, the interpretation of misconduct set out in Justice Akhlaque Husain’s case (PLD 1960 SC 26) was held as reflected the true intent and spirit of Article 209(5) of the Constitution, the Code of Conduct and the Rules of 2005.

6. STANDARDS PRESCRIBED BY THE FOREIGN JURISDICTIONS

This threshold of misconduct is identical to the tests used by the Disciplinary Committees and Parliaments of foreign jurisdictions for the removal of Judges. For example, in *Lawrence v. Attorney General of Grenada* (2007 UKPC 18 at para-25), the Privy Council approved a passage from *Clark v. Vanstone* (2004 FCA 1105) in which the Federal Court of Australia held that:

"Para 85: ...For present purposes, the important proposition to be drawn from these expressions of opinion is that, in a case in which the term 'misbehaviour' is used with reference to the holder of an office, the content of its meaning is to be determined by reference to the effect of the conduct on the capacity of the person to continue to hold the office. In turn, the capacity to continue to hold an office has two aspects. The conduct of the person concerned might be such that it affects directly the person's ability to carry out the office. Alternatively, or in addition, it may affect the perceptions of others in relation to the office, so that any purported performance of the duties of the office will be perceived widely as corrupt, improper or inimical to the interests of the persons, or the organization, for whose benefit the functions of the office are performed."

This passage was again cited with approval by the majority of the Privy Council in *Hearing on the Report of the Chief Justice of Gibraltar* (2009 UKPC 43 at para-202). Even in the United States, where the process of impeachment of Judges is initiated by a Resolution of the House of Representatives (House), the Report dated 10.05.1989 accompanying the Resolution to Impeach United States District Judge Walter L. Nixon, Jr (ref: Report No. 101) stated that:

"Page 12: ...thus, from an historical perspective the question of what conduct by a Federal Judge constitutes an impeachable offense has evolved to the position where the focus is now on public confidence in the integrity and impartiality of the judiciary. When a judge's conduct calls into questions his or her integrity or impartiality, Congress must consider whether impeachment and removal of the judge from office is necessary to protect the integrity of the judicial branch and uphold the public trust."

Likewise in Australia, Sir George Bush sitting in the Parliamentary Commission inquiring into the alleged misconduct of Justice Lionel Keith Murphy, Judge High Court of Australia, held that:

"Page 8: If [judges] conduct, even in matters remote from their work, is such that it would be judged by the standards of the time to throw doubt on their own suitability to continue in office, or to undermine their authority as judges or the standing of their courts, it may be appropriate to remove them."

The House of Representatives in its report dated 08.07.1912 against Robert Wodrow Archbald, Judge of the United States Court of Appeal for the Third Circuit (Pennsylvania, New Jersey, Delaware and Virgin Islands) (ref: Report No. 946) regarding wrong that may have occurred during his tenure in some other judicial office under the Government of the United States prior to his appointment to the particular office from which he is sought to be ousted by impeachment held as under:

"Page 175: It is indeed anomalous if the Congress is powerless to remove a[n] ... unfit Federal Judge from office because his... misdemeanor, however vicious or reprehensible, may have occurred during his tenure

in some other judicial office under the Government of the United States prior to his appointment to the particular office from which he is sought to be ousted by impeachment, although he may have held a Federal Judgeship continuously from the time of the commission of his offenses. Surely the House of Representatives will not recognize nor the Senate apply such a narrow and technical construction of the constitutional provisions relating to impeachments."

Similarly, the House in its report dated 04.03.2010 against G. Thomas Porteous Jr., Judge of the United States District Court for the Eastern District of Louisiana (ref: Report 427) noted that:

".....the critical question which needs to be addressed by the House and Congress is that whether the alleged misconduct demonstrates a lack of integrity and judgment in the Judge which makes him unsuitable to continue to perform the functions of his post. The timing of the misconduct is irrelevant to such a determination (page 19). Indeed, by accepting the contention that a time bar should be imported into the process of judicial accountability, we would be granting immunity to Judges who have committed serious misconduct in their previous posts. This would be contrary to the demand for transparency and fairness in the accountability of Judges, especially when it is self-evident that previous behavior of a Judge is a reflection of character, disposition and professional or private ethics."

'Misconduct' does not mean that trivial indiscretions or infractions of law by Judges or any minor shortcomings in their personal lives render them liable to removal proceedings. Accordingly, the standard for the commission of misconduct must not be so high that it is impossible to allege thus rendering Judges unanswerable for their conduct. On the other hand, the threshold for misconduct must also not be so lenient so as to become a weapon in the hands of disgruntled litigants.

7. CONCLUSION

Justice and Justice alone always ensured peace and stability in any society. The Holy Quran has commanded to do justice at all costs as it is close to piety. Thus, justice ought to be done regardless of consequences and we must not forget the most celebrated Latin maxim, "Do justice though the heavens fall." In this regard, a moment in justice was held as superior to the years of worship. However, justice itself cannot be done without an independent and impartial judiciary. In short, independence of the judiciary shall gain ground only when accountability in the system and amongst people, impartial accountability for all, becomes the rule of law. History has repeatedly witnessed that societies where justice did not prevail, had to pay heavy costs either through homicides or they vanished from the face of the earth. Iranian, French, Chinese, Russian, and the Iranian revolutions are the lessons that need to be learned from the past. Thus, the lesson of history is that when the rule of law gives way to the rule of man, the dykes of law and justice break, and revolutions begin.

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