

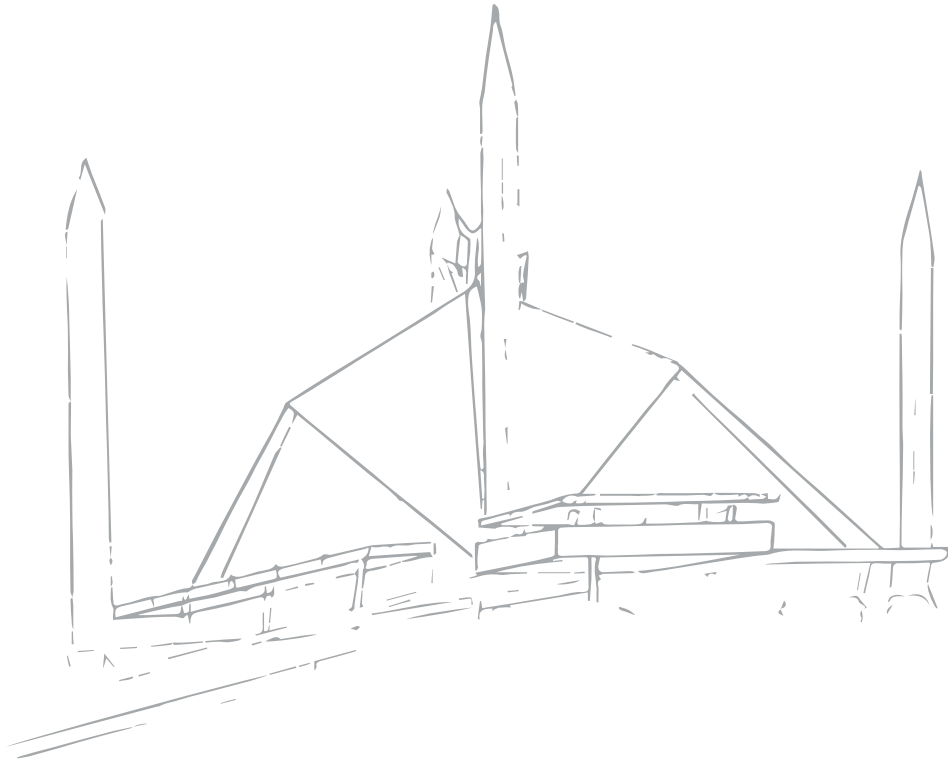


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Constitutionalism and Accountability: A Case of over accountability

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Abstract

“Accountability is required to be seen in a holistic view to get a fair idea of efficient and result oriented accountability mechanism. The concept of accountability is very much entrenched in constitutionalism and rule of law and may not be separated from each other. These components functions within their own spare and checked each other. This paper consists of two parts: part one covers the broader picture of constitutionalism, rule of law and accountability. In part two I argue the situation of accountability in Pakistan with reference to part one.”

1. Introduction

Accountability means one is responsible to another for performing the given duties or activities, and public accountability entails the liability of a public officer (both elected and unelected) to the public for doing their assigned tasks or duties and for their official conduct¹. The idea of public accountability was coined in England which emphasized on accountability of King regarding expenditure from accumulated surplus, which was reformed during the surge of liberal democracy as accountability in regard to public funds. Optimal usage of public funds coupled with transparency and accountability is pre-requisite for good governance. Politician, civil servant and the executives are responsible to the public in regard to anticipated expenditures. The remedy against the bad governance lies in accountability, transparency and predictability coupled with the promotion of civil society, involvement of NGO which may establish link between have and have not. Corruption

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¹ M. Shamsul Haque. "Limits of Public Accountability under the Reinvented State In Developing Nations." *Public Administration Quarterly* 31, no. 3/4 (2007): 429-52.

may be controlled through media, transparency and by establishing effective legal environment. Though transparency is essential for accountability but it clashes with the idea of accountability in various ways. In United States, after war on terror, the executive branch need confidentiality to function effectively which make the accountability of executives more difficult². The situation in Pakistan is not different. The authorities who fight war against terrorism enjoy enough constitutional safeguards in this regard and enjoy immunity from the civilian control anti-corruption institutions³. Accountability is important and affects considerably social, political and economic outcomes. It cannot be narrowly interpreted with reference to traditional doctrine or tenable exclusively through conventional representative democracy. The presumption that democracy paved the way for accountability is incorrect but accountability facilitated the rise of democracy. The author argued that accountability was a background principle which catalyzed the rise success of classical Athenian democracy⁴. Democracy is considered conducive to the commercial and political stability and reduced corruption is thought to be cure for bad governance⁵. However, it should be fully functional but in Pakistan, though military has retreated to the barracks but retained sufficient influence on political issues⁶.

There is a conflict between biased checking the executive and neutral oversight. As indicated above, in absence of robust civil society and strong judicial system, the accountability or

² Shapiro, Sidney A., and Rena I. Steinzor. "The People's Agent: Executive Branch Secrecy and Accountability in an Age of Terrorism." *Law and Contemporary Problems* 69, no. 3 (2006): 99-129.

³ Zulfiqar Ali, "Anti-corruption Institutions and Governmental Change in Pakistan." *South Asia Multidisciplinary Academic Journal* (2018).

⁴ Von Dornum, Deirdre Dionysia. "The Straight and the Crooked: Legal Accountability in Ancient Greece." *Columbia Law Review* 97, no. 5 (1997): 1483-518.

⁵ Stockemer, Daniel. "Does democracy lead to good governance? The question applied to Africa and Latin America." *Global Change, Peace & Security* 21, no. 2 (2009): 241-255.

⁶ Aqil Shah, and Bushra Asif. "Pakistan in 2014: Democracy under the Military's Shadow." *Asian Survey* 55, no. 1 (2015): 48-59.

executive oversight will relatively be politicized⁷. Without sufficient protections, the judiciary too cannot act independently and any law or executive action which violates the principle of independence of judiciary or its separation from judiciary is *ultra vires*⁸. At the same time judiciary too must be held accountable. No social institute can operate without answerable to the society. Besides individual inclination, there are powerful elements, which determine the scope of judicial function including institutional control, collective tradition and institutional character of the court in which the judge sit in the society as a whole⁹.

It is said that the political executive are agent of the people and being agent perform duties on behalf of principle, usually in self-serving manner. Though, principally agent is accountable but control of political agent is more difficult and complex than a corporate agent. This complex relationship demands stringent mechanism of government transparency¹⁰. This agent and principle relationship differs substantially from responsibility which refers to inner control stimulated by professional or personal ethics¹¹. Further all the executive does not fall within the ambit of agent being unelected. The ministerial advisors, who enjoy enough executive powers, being unelected are not the agent of the people and agency theory is not applicable between them¹². Executive, in Parliamentary form of Government, are part and parcel of the legislature and theoretically responsible to elected representatives of the people. Theoretically, executives are to be scrutinized by the representatives of the political sovereign who

⁷ Bowen, Jeff, and Susan Rose-Ackerman. "Partisan Politics and Executive Accountability: Argentina in comparative Perspective." *Supreme Court Economic Review* 10 (2003): 157-210.

⁸ *Younas Abbas v. Additional Session Judge, Chakwal*; 2016 PLD 581 SC.

⁹ Shetreet, Shimon. "Judicial Independence and Accountability in Israel." *The International and Comparative Law Quarterly* 33, no. 4 (1984): 979-1012.

¹⁰ Shapiro, Sidney A., and Rena I. Steinzor.

¹¹ DeLeon, Linda, B. G. Peters, and J. Pierre. "On acting responsibly in a disorderly world: individual ethics and administrative responsibility." *The Handbook of Public Administration (Concise Paperback Edition)*. London: Sage Publications (2007): 351-362.

¹² Ng, Yee-Fui. "Ministerial Advisers: Democracy and Accountability." In *Law and Democracy: Contemporary Questions*, edited by Patmore Glenn and Rubenstein Kim, (ANU Press, 2014), p. 65-84.

may even dismiss them. This however, requires transfer of information coupled with honest and mutual trust¹³. Traditional parliamentary accountability is of two types: horizontal accountability and vertical accountability. The latter observe through regular, free and fair elections¹⁴, whereas former accountability mechanism consist on constitutional check and balance including separation of power¹⁵. But mere regular election does not necessarily promote values of democracy or can achieve robust democratic accountability it promises¹⁶ or merely written constitution does not make a country democratic. Observing constitutionalism is prerequisite for constitutional supremacy and democratic norms to flourish. The negation of constitutionalism makes the provisions of written constitution redundant. The existence of sustainable democracy and constitutionalism require constitutional culture for a considerable time wherein government and all segments of society are in habit of observing the basic principles of constitution¹⁷. However such constitutional norm could not flourish in Pakistan, like other south Asian countries, because of traditional respect for authority and habit of submission before those in authority rather than suspicions to authority. For promotion and expansion of public law to control exercise of executive power in arbitrary fashion, the culture is a big challenge, which also creates governance problems¹⁸.

Parliamentary accountability was a robust mechanism of accountability till the King was sovereign. Once his authority removed and legislature became a governing body and started ignoring the demands of the people on the pretext that such

¹³ MacCarthaigh, Muiris. "Governance and Parliamentary Accountability." (Dublin: UCD Geary Institute, 2007).

¹⁴ Department for international development (DFID) Decentralization and Political Accountability, the World Bank

¹⁵ Ibid

¹⁶ Guinier, Lani. "Beyond Electocracy: Rethinking the Political Representative as Powerful Stranger." *The Modern Law Review* 71, no. 1 (2008): 1-35.

¹⁷ Kirkham, David M. "Constitutionalism as Protector or Disrupter of Nationalism: A Selected Central, Eastern European and Eurasian Review." *Connections* 3, no. 4 (2004): 43-52.

¹⁸ Tan, Kevin Y. L. "The Role of Public Law in a Developing Asia." *Singapore Journal of Legal Studies*, 2004, 265-86.

demands represent a small segment of the society, whereas, they represent the whole. Parliament which was used to give consent to king's law on behalf of the people started legislating by itself. Being aggrieved from the situation, the people sought other ways for protection of their rights. In England Leveller proposed to set limits on legislatures. The idea was ignored by the English and equated the legislature with people. However, American adopted the proposal and ignored the concept of popular sovereignty and set limits while framing its constitution. Accordingly government is separate from the people thus adopted a form of strategy suggested by Leveller in England. In his view, accountability is the mean in which entire people stands apart from the government, in all its segments, and enforces the people's compact with its government. It is a way to enforce the trust placed in the representatives. He suggests the model in which an accountable system of government is not irreconcilable with the idea of an independent judiciary¹⁹. Accordingly government and the people could not be same and thus adopted a form of strategy suggested by Leveller in England. In his view, accountability is the mean in which entire people stands apart from the government, in all its segments, and enforces the people's compact with its government. It is a way to enforce the trust placed in the representatives. He suggests the model in which an accountable system of government is not irreconcilable with the idea of an independent judiciary²⁰. However, the traditional parliamentary accountability, as being observed by Westminster model democracies, has lost much of its vigor because of several Parliamentary practices. Executives control parliamentary agenda with convenience²¹. Rise of administrative state, relatively weak second chamber, centralization of powers in Prime Minister Office away from the cabinet as a whole and rise and dominance of modern political party. These developments have created a situation in which judicial review appear to offer the individual citizens respite from the sense of powerlessness in face of

¹⁹ Brown, Rebecca L. "Accountability, Liberty, and the Constitution." *Columbia Law Review* 98, no. 3 (1998): 531-79.

²⁰ Brown, Rebecca L. "Accountability, Liberty, and the Constitution." *Columbia Law Review* 98, no. 3 (1998): 531-79.

²¹ *Ibid.*, p. 19.

authority that democratic theory and political accountability seem to promise but too rarely provide²².

2. Historical Overview

Pakistan came into being in 1947 and it opted Government of Indian Act, 1935 as an interim constitution with some modification²³. In 1954, when constitution was yet to frame, Pakistan had to face first constitutional crises when the Governor General dissolved the constituent assembly and the same was upheld by Federal Court²⁴. The constitution of 1956, just after two years of its promulgation, was abrogated by President General Askandar Mirza, who imposed Martial Law and dissolved Federal as well as Provincial Assemblies²⁵. The Supreme Court of Pakistan validated the imposition of Martial Law on the basis of Doctrine of State Necessity²⁶, though it was declared that the country would be governed as nearly as possible according to the constitution of 1956²⁷. Pakistan adopted its second constitution in 1962, with Presidential form of government. General Ayub Khan ruled till 1969 and forced to leave the throne for General Muhammad Yayha Khan, who imposed Martial Law and abrogated the constitution²⁸. The Martial Law of General Yayha was declared unconstitutional after his departure by Supreme Court of Pakistan²⁹. In 1971 East Pakistan was separated and the remaining Pakistan's National Assembly unanimously passed constitution of Pakistan. In 1977, once again, military came into power but this time constitution was not abrogated but hold in

²² GARDBAUM, STEPHEN. "Separation of Powers and the Growth of Judicial Review in Established Democracies (or Why Has the Model of Legislative Supremacy Mostly Been Withdrawn From Sale?)." *The American Journal of Comparative Law* 62, no. 3 (2014): 613-39.

²³ Section 8 Indian Independence Act, 1947

²⁴ Federation of Pakistan v. Maulvi Tamizuddin khan, PLD 1955 Federal Court 240

²⁵ Hamid Khan, *Constitutional and political history of Pakistan*. (Karachi: Oxford University Press, 2005). p.118.

²⁶ *State v. Dosso*, PLD 1958 SC 533.

²⁷ *Province of East Pakistan v, Muhammad Mehdi Ali khan*, PLD 1959 SC 387.

²⁸ Hamid Khan, p. 201.

²⁹ Miss Asma Jilani V. government of the Punjab and another and Mrs. Zarina Gauhar V. the province of Sindh and two other, PLD 1972 SC 139

abeyance³⁰. Once again Supreme Court validated the imposition of Martial Law again on the basis of Doctrine of State Necessity³¹. General Zia remained in power till his death in 1988. Though Martial Law was lifted in 1985³². Election was held on Non-Party basis and the newly elected Parliament passed 8th amendment wherein all the order passed by the Chief Martial Administrator were validated. Eight amendment changed complexion of the constitution all together. After the death of General Zia, election was held on party basis and Pakistan Peoples party came into power. This democratic era ended soon when General Pervez Musharraf proclaimed emergency on 14th October 1999 and it was declared that the country would be governed as nearly as possible, in accordance with constitution³³. Once again the military's action and imposition of Emergency was declared valid by Supreme Court of Pakistan³⁴.

The military remained in power directly for more than 30 years and every time judiciary validated his unconstitutional acts. In spite of having written constitution superior courts of Pakistan remained fail to observe constitutionalism, which is prerequisite for constitutional supremacy and democratic norms to flourish. Decisions of Supreme Court made the provisions of written constitution redundant. However, every time the constitution was abrogated and Martial Law was imposed, the people of Pakistan did not resist generally because people of Pakistan were not in habit of observing constitutionalism. In absence of support of masses, how five judges alone, unsupported by anyone, could declare Martial Law illegal? Asked Dorab Patel, Judge Supreme Court of Pakistan³⁵. Thus being unsupported and complete lack of resistance from civil society against unconstitutional acts of the military, the Judiciary, in Pakistan, tried to avoid confrontation

³⁰ Proclamation of Martial Law, 5th July, 1977, PLD 1977 Central Statues, 326.

³¹ Begum Nusrat Bhatto V Chief of Army Staff and Federation of Pakistan, PLD 1977 SC 657.

³² Proclamation of withdrawal of Martial Law. PLD 1986 Central Statues 9.

³³ PLD 1999 Central Statue, 448.

³⁴ Syed Zafar Ali Shah V Pervez Musharraf PLD 2000 SC 869.

³⁵ Paula R. Newberg, *Judging the State, Courts and Constitutional Politics of Pakistan*, (Cambridge University, 2002), p. 07.

with executive and consequently lost its way to take the path of least resistance³⁶. The existence of sustainable democracy and constitutionalism require constitutional culture for a considerable time wherein government and all segments of society are in habit of observing the basic principles of constitution³⁷. However such constitutional norm could not flourish in Pakistan, like other south Asian countries, because of traditional respect for authority and habit of submission before those in authority rather than suspicions to authority. For advancement and growth of public law to control exercise of executive power in arbitrary fashion, this culture is a big challenge, which also create governance problems³⁸.

Though every time judiciary validated and endorsed unconstitutional acts of military and in consequences, the Martial Law authorities damaged the very core of the independence of Judiciary and each time added more drastic provisions to control and make judiciary docile³⁹. After imposition of Martial Law, General Ayub Khan appointed a constitutional commission, which was headed by retired Justice Shahabuddin who submitted its report on 6 May, 1961⁴⁰. The commission recommended all the safeguards to ensure the independence of judiciary as was embodied in constitution of 1956. However the recommendations were modified by the cabinet sub-committee. The method of removal of judges was made different from the constitution of 1956⁴¹. Legislatures were declared sovereign and it was competent to decide the constitutionality of any law⁴². However, through first constitutional amendment, the judiciary were

³⁶ Ibid.

³⁷ Kirkham, David M. "Constitutionalism as Protector or Disrupter of Nationalism: A Selected Central, Eastern European and Eurasian Review." *Connections* 3, no. 4 (2004): 43-52.

³⁸ Tan, Kevin Y. L. "THE ROLE OF PUBLIC LAW IN A DEVELOPING ASIA." *Singapore Journal of Legal Studies*, 2004, 265-86.

³⁹ Shah, Amanullah. "Impact of Army on Independence of the Judiciary in Pakistan." *Gomal University Journal of Research* 25, no. 2 (2009): 1-10.

⁴⁰ President Ayub's Broadcast of 1 March 1962, Speeches and Statements of F.M. Muhammad Ayub Khan, Vol. IV, P. 170.

⁴¹ Hamid Khan p. 148-149.

⁴² Art. 133 of constitution of 1962

empowered to pass judgment over the vires of the legislature⁴³. The jurisdiction of Superior court were further curtailed to the extent of decision of military courts and interpretation of Martial Law and Regulation⁴⁴ and the Judges were required to declare their assets⁴⁵. In 1973 constitution superior courts were given enough constitutional safeguards and ample jurisdiction⁴⁶. Bhutto government too, like previous dictators, curtailed jurisdiction of superior courts⁴⁷. According to constitution judiciary was required to be separated from executive within three years, which was extended to five years by Constitution (Fifth Amendment) Act, 1976. Tenure for the office of Chief Justice of Pakistan and Chief Justice of High Court, unless retired earlier was fixed five and four years respectively. They were given option either to retire or serve as Judge of Supreme Court or High Court, as the case may be, after completion of tenure for office. Such Chief Justice, who continue after the completion of term of his office as senior most judge, could not again be appointed even as acting Chief Justice in absence of Chief Justice. The amendment was made applicable on sitting Chief Justice of Supreme Court or High Court. The Supreme Court was made subject to Art. 175 (2). Jurisdictions of superior courts under Art. 199 was further curtailed in matter of preventive detention. A judge of High Court could be transferred to any other High Court for the period of one year without his consent. Power of High Court under Art. 204 regarding contempt of court made subject to ordinary law. A judge of High Court who

⁴³ Constitution (first amendment) Act, 1963. Act I of 1964. PLD 1964 Central Statutes 33

⁴⁴ Jurisdiction of Courts (Removal of Doubts) Order, 1969. President's Order 3 of 1969. PLD 1969 Central Statutes 119.

⁴⁵ Judges (Declaration of Assets) Order, 1969. President's Order 4 of 1969. PLD 1969 Central Statutes 120. Under this order enquiries were held into the financial affairs of the judges. Mr. Justice Fazal Ghani Khan of Lahore High Court resigned in result of enquiry held by Supreme Judicial Council under Presidential Order and Mr. Justice Shaukat Ali was held guilty of misconduct and removed on the recommendation of the Council. *President v Justice Shaukat Ali*, PLD 1971 S.C. 585.

⁴⁶ Art. 189, 190, 184, 185, 186, 199, 176, 177, 207, 209.

⁴⁷ Constitution (Fourth Amendment) Act, 1975. Act LXXI of 1975. PLD 1975 Central Statutes 337. Accordingly High Courts were forbidden from issuing any order for preventative detention of a person or to grant bail to such person. Jurisdiction of High Courts were further curtailed in matter of stay of recovery, assessment, or collection of public revenues.

refused to accept his elevation to Supreme Court would be deemed to retire from his office⁴⁸. Armed Forces lead by General Zia-Ul-Haq took over the administration of the country on 5th July 1977 and constitution was held in abeyance⁴⁹. Once again military courts were established and declared immune from jurisdiction of civil courts by adding Art. 212-A⁵⁰. This constitutional amendment and Martial Order 48 banning all political parties were challenged before Lahore High Court, which was admitted for regular hearing. The Martial Law authorities reacted quickly and barred jurisdiction of High Court from making any order regarding validity of any order of Martial Law authorities⁵¹. New constitutional court i.e. Federal Shariat Court was also established with the jurisdiction to declare invalid any law or provision of law being inconsistent with injunction of Islam as laid down in Quran and Sunnah⁵². In March 1981, a PIA plan was hijacked and Zia quickly enforced Provisional Constitutional Order (PCO) and judges had to take fresh oath under PCO⁵³. Following traditional course, the court did not take long to validate PCO⁵⁴. Zia remained at the helm of affair till his death in 1988 and democratic government headed by Benazir Bhutto came into power in August 1988 and remained Prime Minister till August 1990. Thereafter Nawaz Sharif's came into power as Prime Minister of Pakistan. In 1991 Nawaz Sharif government, the parliament passed twelfth Amendment to the constitution by adding Article 212-B and established special courts for the trial of heinous offences. This amendment created a hierarchy of courts parallel to the constitutional hierarchy consisting of High and the Supreme Court. The amendment was made temporarily for period of three

⁴⁸ Constitution (Fifth Amendment) Act, 1976. Act LXII of 1976 Central Statues 538.

⁴⁹ Proclamation of Martial Law, 5 July 1977, PLD 1977 Central Statues 327.

⁵⁰ Constitution (Second Amendment) Order 1979. President's Order 21 of 1979 Central Statues 567.

⁵¹ Constitution (Amendment) Order, 1980. President's Oder 1 of 1980. PLD Central Statues 1980.

⁵² *ibid*

⁵³ Provisional Constitution Order, 1981. CMLA's Order 1 of 1981. PLD 1981 Central Statues 183.

⁵⁴ Tadjamal Hussain Malik v Federal Government of Pakistan, PLD 1981 Lahore 462.

years⁵⁵. In second government of Benazir Bhutto appointments were made in superior judiciary that came before Supreme Court of Pakistan to consider constitutionality of those appointments. The Supreme Court of Pakistan settled the law for appointment of Judges by accepting the appeals against such appointments. Supreme Court held that appointment of ad hoc judges against permanent vacancies violates the constitution, acting chief justice cannot be consultee for appointment of judges, an additional judges acquires a reasonable expectancy to be considered for appointment as Permanent judge, all permanent vacancies should be filled in advance, senior most judge of a High Court has a legitimate expectancy to be considered for appointment as Chief Justice...⁵⁶. This judgment is commonly known as judges' case and settled many questions regarding appointment of judges in superior court. The issue of appointment is directly linked with the independence of judiciary. Democratic government was once again sacked in October 1999, which too was validated by Supreme Court of Pakistan vide Syed Zafar Ali Shah case. Being annoyed from suo moto actions took by Chief Justice Iftikhar Muhammad Chaudhry, Musharraf called the Chief Justice to Army House and forced him to resign. After refusal of Chief Justice, Musharraf restrained him from performing duties by order and referred the matter to Supreme Judicial Council⁵⁷. The Chief Justice filed a constitutional petition before Supreme, which was accepted and Chief Justice was restored⁵⁸. In October 2007 Wajihuddin, a former judge Supreme Court of Pakistan filed constitutional petition against acceptance of nomination paper of General Musharraf for office of the President by Election Commission of Pakistan. Musharraf panicked and as pre-emptive act imposed emergency on 3 November, 2007⁵⁹ and issued Provisional Constitutional Order⁶⁰. However he was finally reinstated to the position of Chief Justice after a long struggle by

⁵⁵ Constitution (Twelfth Amendment) Act, 1991, Act XIV of 1991, PLD 1991 Central Statues 461

⁵⁶ Hamid Khan, p. 51.

⁵⁷ *Al-Jehad Trust v. Federation of Pakistan*, PLD 1996 S.C. 324.

⁵⁸ *Mr. Justice Iftikhar Muhammad Chaudhry v President of Pakistan*, PLD 2007 S.C. 578.

⁵⁹ PLD 2008 Federal Statues 108

⁶⁰ Provisional Constitutional Order 1 of 2007, PLD 2008 Federal Statues 110.

lawyers, civil society and political parties. However after restoration judiciary set his own house in order by expelling PCO judges⁶¹. Above was the brief history of the judiciary, who has always be handmaiden of dictators and powerful executives, except a brief period of Chaudhry court. In return, every dictator generally and civilian government occasionally added more stringent legal provisions not only to curtailed jurisdiction of the superior courts even to humiliate the judges.

So far we discussed judiciary with reference to military governments. However judiciary exercised significant autonomy from civilian political actors not only in direct military rule but even under civilian rule⁶². As the Supreme Court invalidated many appointments in judiciary made by Prime Minister Benazir Bhutto⁶³, the Supreme Court got appointed the judges recommended by the Chief Justice under the dictum of Judges' case successfully, though Prime Minister Nawaz Sharif was reluctant⁶⁴. Though, judiciary never resisted the military regimes but made recommendation of Chief Justice regarding appointment of judges binding on government subject to very sound reasons recorded by the President⁶⁵. In 1997 Parliament adopted two constitutional amendments and repealed Art. 58(2) (b), the action was challenged through Petitions. The Supreme Court tried to enjoin their enforcement. Nawaz Sharif mounted a campaign which led to contempt of court proceedings against him. Consequently efforts to divide judiciary succeeded and ousted the Chief Justice from office⁶⁶. During 1999 to 2008, Musharraf reigned directly or indirectly. In 2008, People Party headed by Asif Ali Zardari came into power and Zardari took the office of President of Pakistan. To pave the way for People Party, Musharraf issued National Reconciliation Ordinance, under which the cases against Mr. Zardari were dropped. In December 2009, Supreme Court took up the case of NRO to judge the vires of the Ordinance and declared it unconstitutional and ordered the

⁶¹ Hamid Khan, p. 547-564.

⁶² Gazdar, Haris. "Judicial activism vs democratic consolidation in Pakistan." *Economic and Political Weekly* 44, no. 32 (2009): 8-14.

⁶³ Supra 62

⁶⁴ Khan, Supra 66, p.623-625.

⁶⁵ Supra 62

⁶⁶ Asad Ali v Federation of Pakistan, 1998 PLD S.C. 161

government to reinstate all the cases withdrawn under NRO⁶⁷. The government decided to resist the judgment consequently Supreme Court unilaterally disqualify the Prime Minister for non-compliance of its order⁶⁸. Musharraf made university degree compulsory for members of Parliament, which was declared unconstitutional by Supreme Court headed by Abdul Hameed Dogar⁶⁹. However the Supreme Court, headed by Iftikhar Muhammad Chaudhry, took cognizance of allegation of having false degree by various members of Parliament and ordered to the Election Commission of Pakistan to probe the degrees of the members of Parliament⁷⁰. The provision which had been invalidated by the Supreme Court (headed by Abdul Hameed Dogar) was used by declaring the false claim of degrees as corrupt practices. In 2010, the Parliament unanimously adopted 18th amendment to the constitution, which was in line with the Charter of Democracy signed by PML (N) and PPP. The amendment reasserted the civilian supremacy, declaring the amendments made by Musharraf as unconstitutional and without lawful authority. Under 18th amendment procedure for appointment of judges was also changed by adding Art. 175-A of the Constitution. Though there was no much implication of Art. 175-A but it was challenged through various petition on various grounds mainly being contradictory to Salient features of the constitution. Though court did not pass final judgment and referred the matter to the Parliament with certain directions but Chief Justice criticized the Parliament for lack of debate over the amendment Package, another judge criticized for not taking the petitioners into confidence. Several Judges criticized the parliament for articulating why the amendment was necessary⁷¹. The Parliament in light of directions of Supreme Court of Pakistan adopted 19th amendment to the constitution⁷². Soon the Supreme Court

⁶⁷ Sindh High Court Bar Association v Federation of Pakistan, PLD 2009 S.C. 789

⁶⁸ Muhammad Azhar Siddique and Others v. Federation of Pakistan and Other, PLD 2012 S.C. 774

⁶⁹ Muhammad Nasir Mehmood v. Federation of Pakistan, PLD 2009 S.C. 107

⁷⁰ Muhammad Rizwan Gill V. Nadia Aziz, PLD 2010 S.C. 828

⁷¹ Nadeem Ahmad Khan v. Federation of Pakistan, PLD 2010 S.C. 1165

⁷² Constitution (19th Amendment), Act, 2010. Act 1 of 2011.

asserted supremacy over Parliamentary Committee for appointment of judges⁷³.

3. Judicial Autonomy

Discussion regarding Judiciary autonomy with reference to civilian institution, it has manifestly clear that, especially after the much celebrated period of challenging military regime of Musharraf, the judiciary remained overactive against weak civilian government and asserted undue autonomy. In this way judiciary has been swinging in two extreme i.e. submissive before nonelected institution and over asserted before weak elected representatives. Resultantly could not define the contours of independence of judiciary. Pakistan has experienced alternate military and civilian rule, which contributed imbalance between judiciary and other institutions. This imbalance help the unelected state institutions at the expense of weak representative institutions⁷⁴ Prevention of Anti-Corruption Act, 1947 was the first act to eradicate the evil of corruption fallowed by long line of such laws including Sindh Prevention of Bribery and Corruption Act, 1950, Public and Representative Office (Disqualification) Act, 1947, the Pakistan Criminal Law (Amendment) Act, 1958, the West Pakistan Departmental Inquiries (Powers) Act, 1958, Elective Bodies (Disqualification) Order, 1959, the West Pakistan Anti-Corruption (Establishment) Order, 1961 and the Government Servant (Conduct) Rules 1964. All the laws were applicable on public sector institutions and public servants. In second phase i.e. 1973-1989, the first most important law framed was constitution of 1973. The 1973 constitution set out Auditor General Office and Public Accounts Committee. The office of Wafaqi Mohtasib⁷⁵, Federal Investigation Agency was established. The third historical phase started in 1989 which still continue. Removal from Service (Special Powers) Order, 2000 was promulgated during Musharraf rule. National Accountability Bureau was established. All the

⁷³ Munir Hussain Bhatti v. Federation of Pakistan, PLD 2011 S.C 411

⁷⁴ Kalhan, Anil. "Gray Zone Constitutionalism and the Dilemma of Judicial Independence in Pakistan." *Vand. J. Transnat'l L.* 46 (2013): 1.P. 10

⁷⁵ Wafaqi Mohtasib (Ombudsman) Order, 1983

above mentioned laws were applicable to mainly to the representatives of the people and civil servants.

Perception about accountability in Pakistan remained all the time as partial and not independent, which had been used to arm twist of political opponent to get there loyalty. Public and Representative Office (Disqualification) Act, 1949 was applied to the Prime Minister, Chief Minister, Federal Ministers, Provincial Ministers, Parliamentary Secretaries, Members of Federal and Provincial Legislatures. Reference was required to be filed under this act by the Governor General or Provincial Governor before tribunal established for this purpose. The jurisdiction of were barred. The Governor General by exercising the powers conferred upon him through Public and Representative Office (Disqualification) Act, 1948 disqualified M.A Khurru, Chief Minister of Sindh for any public office for three years. Mr. Khurru challenged his disqualification and questioned the constitutionality of the vires of the PRODA but court upheld PRODA⁷⁶. The Elective Bodies (Disqualification) Order was used by military regime effectively to neutralize the elements, who could resist the military regime. This order includes all the offences mentioned in PRODA, 1949 in addition to indulgence in subversive activities, preaching of any doctrine or doing of any act leading to destabilize the state, abuse of power, any attempt, act or abetment of misconduct. Reference to be filed before the President or the governor who referred the matter to special tribunal constituted for this purpose. In 1976 another anticorruption law was promulgated namely Holders of Representative Office (Prevention of Misconduct) Act, 1976. Accordingly the act was applicable to all the persons mentioned in PRODA, 1949. Misconduct was defined as accepting or obtaining any illegal gratification, anything valuable without consideration, dishonestly and fraudulently misappropriating public property. Civilian governments used their own peculiar accountability devices against their political rivals. The Ehtesab Bureau was established by Nawaz Sharif's government headed by Senator Saif Ur Rehman earned his own notoriety in this regard. NAB, the latest in this line is perhaps the most controversial institute of

⁷⁶ M.A. Khurru v. Federation of Pakistan, PLD 1950 Sindh 49.

Pakistan's history⁷⁷ and, like previous instruments, NAB is also being used against political opponents. It serves political purposes more than to eradicate the evil of corruption. Political figures on one sides are being victimized out of proportion whereas, the misdeeds of those from other side of political line are being conveniently ignored⁷⁸.

4. Conclusion

Constitutionalism, accountability and rule of law constituted the sword that can chop the head of impunity⁷⁹. All the above mentioned legal devices are inseparable and sine qua non for genuine accountability in a country⁸⁰. However, mere accountability divorced from rule of law and constitutionalism can neither chop the head of impunity nor can establish good order in the society. Unfortunately our history tells us that we, as a nation, remained failed to observe constitutionalism, rule of law and accountability in letter and spirit. Weakness in any one of such component may jeopardize the performance of other components. Thus the efficacy of accountability of one component is bound to be affected by working of the other component. On one hand a powerful segment of the state is immune from civilian accountability whereas, on the other side accountability institutions were/are being used to control political rivals. The nation has been witnessing no accountability or over accountability but not the meaningful or purposeful accountability. The judiciary, who was primarily responsible to observe constitutionalism and rule of law, during all this era did not play its role to keep the accountability institutions within the limits ordained by the constitution. Since inception of Pakistan, except short period from 2007 to 2013, the judiciary remained handmaiden of the powerful executive and remained miserably

⁷⁷ Mehboob, Ahmad Bilal. "Credibility of Accountability". Dawn 10th November, 2019

⁷⁸ Khawaja Salman Rafique Vs. National Accountability Bureau, Civil petition No. 2243-L of 2019, Supreme Court of Pakistan dated 17-03-2020

⁷⁹ Economic Freedom Fighter V. Speaker National Assembly, 2016 SCMR 1040

⁸⁰ Myth of Accountability, the Nation March, 18, 2017 by Afrasiab Khattak

failed to observe the constitution in letter and spirit⁸¹. Except relatively a small period of independence of Chaudhry court, the judiciary in Pakistan works to serve the deep state and unduly asserted its independence against weak civilian organs of the state⁸². Even Chaudhry Court and lawyers' movement could not yield judicial power which might transfer its fruits except to a narrow unaccountable group of elite judges and lawyers⁸³. Pakistan needs a robust and effective constitutional system for across the board accountability with no holy cows and no witch-hunts, which is sine qua non for good governance. Consequence of failure of accountability is bad governance. Good governance takes place when the process of governance is conducted within the framework of constitution and constitutionalism, separation of power, rule of law and due process of law⁸⁴. Pakistan had experienced unnecessary overstepping of judiciary and armed forces, which resulted in institutional imbalance and this imbalance, serve purposes for unelected institutions. Traditional Parliamentary accountability of executive may not be result oriented unless involved by civil society, NGO, vibrant media coupled with transparency. Full functional democracy coupled with independent judiciary equipped with power of Judicial Review is also sine qua non for effective accountability. Parliamentary accountability is mainly of two types i.e. Vertical and Horizontal. Though political executive in Parliamentary form of government are directly elected representatives and presumed to be accountable to the people. But this relationship of agency is much more complex than corporate agency. Further, unelected executives who enjoy enough executive power are immune from this direct accountability of electorates. The traditional parliamentary accountability has lost its vigor because of various

⁸¹ Khan, Muhammad Ikramullah, and Ayaz Muhammad. "An Evaluation of Separation of Powers: A Case Study of Pakistan (2007-2013)." *South Asian Studies* (1026-678X) 31, no. 1 (2016).

⁸² Kalhan, Anil. "Gray Zone Constitutionalism and the Dilemma of Judicial Independence in Pakistan." *Vand. J. Transnat'l L.* 46 (2013): 1.

⁸³ Khan, Maryam. "Empowerment without Accountability? The Lawyers' Movement in Pakistan and its Aftershocks." (2019).

⁸⁴ Ahmad Mohiddin, Regional overview of the Impact of Failure Accountability on Poor People, Human Development Report Office, Occasional Paper, HDR 2002, United National Development Program, PP. 1-12

parliamentary practices thus impartial accountability mechanism is need. Any form of accountability divorced from the above depicted situation may not serve purpose.